

Case 2:06-cv-01284-JCC Document 23-2 Filed 11/01/2006 Page 1 of 97

Case 2:05-cv-05079-FVS Document 98 Filed 10/03/2006

1 Floyd E. Ivey
2 Liebler, Ivey, Connor, Berry & St. Hilaire
3 1141 N. Edison, Suite C
4 P.O. Box 6125
5 Kennewick, WA 99336
6 Telephone (509) 735-3581
7 Fax (509) 735-3585
8 Attorneys for Defendant

Hon. Fred Van Sickle

5 Mr. Robert J. Siegel
6 1325 4th Ave Ste 940
7 Seattle, WA 98101-2509
8 Telephone (206) 624-9392
9 Fax (206) 624-0717
10 Attorney for Plaintiff

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON**

13 JAMES S. GORDON, JR., a married, } NO. CV-05-5079-FVS
14 individual, d/b/a }
15 'GORDONWORKS.COM', } DEFENDANT'S MOTION
16 Plaintiffs } TO DISMISS PLAINTIFFS'
17 vs. } FIRST AMENDED
18 ASCENTIVE, LLC, a Delaware limited } COMPLAINT
19 liability company; ADAM SCHRAN, }
20 individually and as part of his marital }
21 community; JOHN DOES I-X, }
22 Defendant }
23

24 The Defendant Moves for Dismissal of Plaintiffs' First Amended Complaint
25 on the basis that Plaintiffs have failed to state a claim upon which relief may be
26 granted.

27 This Motion supported by Defendant's Memorandum of Authorities
28 Supporting Defendant's Motion to Dismiss and the Declaration of Floyd E. Ivey.

Defendants' Motion to Dismiss Plaintiff's First
Amended Complaint - 1.

Z:\IPC\client\Ascentive LLC v.
Gordon\Pleadings\MotionDismissFirstAmendcomplaint.060927\MotionDismissFi
rstAmended060518\MotionDismiss FAC.MOTION.First Amended
Complaint.061002.wpd

LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE
Attorneys at Law
P.O. Box 6125
Kennewick, Washington 99336-0125
(509) 735-3581

Exhibit 7

98

1
2 DATED this 3rd day of October, 2006.
3

4
5 LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE
6

7
8 s/ Floyd E. Ivey
9 By s/ FLOYD E. IVEY
10 FLOYD E. IVEY, WSBA #6888
11 Counsel for Defendant
12 1141 N. Edison, Suite C
13 Kennewick, WA 99336
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I hereby certify that on October 3, 2006, I electronically filed **Defendants' Motion to Dismiss Plaintiff's First Amended Complaint** with the Clerk of the Court using the CM/ECF System which will send notification of such filing to Robert J. Siegel.

S/ FLOYD E. IVEY
FLOYD E. IVEY

Defendants' Motion to Dismiss Plaintiff's First Amended Complaint - 2.

Z:\VIPC\lient\Ascentive LLC v.
Gordon\Pleadings\MotionDismissFirstAmendcomplaint.060927\MotionDismissFi
rstAmended060518\MotionDismiss FAC.MOTION.First Amended
Complaint.061002.wpd

LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE
Attorneys at Law
P.O. Box 6125
Kennewick, Washington 99336-0125
(509) 735-3581

59

3 Floyd E. Ivey
4 Liebler, Ivey, Connor, Berry & St. Hilaire
5 1141 N. Edison, Suite C
6 P.O. Box 6125
Kennewick, WA 99336
Telephone (509) 735-3581
Fax (509) 735-3585
6 Attorneys for Defendant

Hon. Fred Van Sickle

7 Mr. Robert J. Siegel
1325 4th Ave Ste 940
8 Seattle, WA 98101-2509
9 Telephone (206) 624-9392
Fax (206) 624-0717
Attorney for Plaintiff

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON**

JAMES S. GORDON, JR., a married,
individual, d/b/a
'GORDONWORKS.COM',

NO. CV-05-5079-FVS

DEFENDANT'S
MEMORANDUM IN
SUPPORT OF MOTION
TO DISMISS PLAINTIFF'S
FIRST AMENDED
COMPLAINT PURSUANT
12(b)(1), (2) AND (6)

ASCENTIVE, LLC, a Delaware limited liability company; ADAM SCHRAN, individually and as part of his marital community; JOHN DOES I-X,

Defendant

Defendants' Memorandum in Support of Motion to
Dismiss Plaintiff's First Amended Complaint - 1.
Z:\VIPC\client\Ascentive LLC v.
Gordon\Pleadings\MotionDismissFirstAmendcomplaint.060927\MotionDismissFirstAmend060518\MotionDismissFAC.MEMO Support Mtn Dismiss First Amended Complaint 061003.wrd

LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE
Attorneys at Law
P.O. Box 6125
Kennewick, Washington 99336-0125
(509) 735-3581

60

1
2 **TABLE OF CONTENTS**
3

	<u>Page</u>
5 I. PRELIMINARY STATEMENT	5
6 II. INTRODUCTION & PROCEDURAL HISTORY	5
7 III. LEGAL ARGUMENT	7
8 A. Plaintiff Failed to Comply with the Court's Order 9 Denying His Request to Add New Plaintiffs by 9 Adding "d/b/a 'Gordonworks.com'"	7
10 B. Plaintiff Lacks Standing to Bring an Action on 11 Behalf of an Unregistered d/b/a (Trade Name)	7
12 C. Plaintiff Lacks Standing to Bring a Cause of 13 Action as an "Interactive Computer Service" 13 Under CEMA and CPA	8
14 D. Plaintiff Lacks Standing to Bring a Cause of 14 Action Under CAN-SPAM	9
15 E. Plaintiff Fails to State a Claim and Lacks Standing 16 To Bring an Action Under the Prize Statute	10
17 F. Plaintiff's Amended Complaint Should be Dismissed 17 Pursuant to FRCP 12(b)(6) for Failure to 18 State a Claim	10
19 G. If the Amended Complaint is not Dismissed, 19 Plaintiff Should be Required to Provide a More 19 Definite Statement Pursuant to FRCP 12(e).....	13
20 IV. CONCLUSION	15

21
22
23
24
25
26
27
28
Defendants' Memorandum in Support of Motion to
Dismiss Plaintiff's First Amended Complaint - 2.
Z :\ I P C l i e n t \ A s c e n t i v e _ L L C \ v.
Gordon\Pleadings\MotionDismissFirstAmendcomplaint.060927\MotionDismissFi
rstAmended060518\MotionDismissFAC.MEMO Support Mtn Dismiss First
Amended Complaint 061003.wpd

LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE
Attorneys at Law
P.O. Box 6125
Kennewick, Washington 99336-0125
(509) 735-3581

1 **TABLE OF AUTHORITIES**

		<u>Page</u>
2		
3	<u>Cases & Secondary Sources</u>	
4	<i>Epstein v. Washington Energy Co.</i> , 83 F.3d 1136, 1140 (9 th Cir. 1996)	11
5	<i>Roe v. Nevada</i> , 332 F.Supp. 2d 1331, 1339 (D. Nev. 2004)	11
6	<i>Scheid v. Fanny Farmer Candy Shops, Inc.</i> , 859 F.2d 434 (6 th Cir. 1988)	11
7	<i>W. Mining Council v. Watt</i> , 643 F.2d 618, 624 (9 th Cir. 1981)	11
8	<i>Washburn, et al. v. Moorman Manufacturing Co.</i> , 25 F.Supp 546, 546 (S.D. Cal. 1938)	14
9		
10		
11	<u>Statutes</u>	
12	CR 8(a)	10, 14
13	CR 12(e)	14
14	FRCP 8(a)	10, 14
15	FRCP 12(b)(6)	5, 11, 13
16	FRCP 12(e)	5, 15
17	FRCP 15	6, 7
18	RCW §19.170, <i>et seq.</i>	5, 14
19	RCW §19.170.030	10
20	RCW §19.170.040	10
21	RCW §19.170.060(1)	10
22	RCW §19.190.010(5)	8
23	RCW §19.190.010(14)	8
24	RCW §19.190.040(1)	8
25	RCW §19.190.040(2)	8
26	RCW §19.80.010(1)	7
27	RCW §19.80.040	7
28	Defendants' Memorandum in Support of Motion to Dismiss Plaintiff's First Amended Complaint - 3. Z:\IPC\lient\Ascentive LLC v. Gordon\Pleadings\MotionDismissFirstAmendcomplaint.060927\MotionDismissFi rstAmended060518\MotionDismissFAC.MEMO Support Mtn Dismiss First Amended Complaint 061003.wpd	LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE Attorneys at Law P.O. Box 6125 Kennewick, Washington 99336-0125 (509) 735-3581

1	15 U.S.C. §7701, <i>et seq.</i>	5
2	15 U.S.C. §7702(11)	9
3	15 U.S.C. §7702(14)	8
4	15 U.S.C. §7706(a)	9
5	47 U.S.C. §231(e)(4)	9
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28	Defendants' Memorandum in Support of Motion to Dismiss Plaintiff's First Amended Complaint - 4. Z:\IPC\client\Ascentive LLC v. Gordon\Pleadings\MotionDismissFirstAmendcomplaint.060927\MotionDismissFi rstAmended060518\MotionDismissFAC.MEMO Support Mtn Dismiss First Amended Complaint 061003.wpd	LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE Attorneys at Law P.O. Box 6125 Kennewick, Washington 99336-0125 (509) 735-3581

PRELIMINARY STATEMENT

Defendants, Ascentive, LLC (Ascentive) and Adam Schran (Schran) submit this Memorandum of Law in support of their motion to dismiss portions of Plaintiff's complaint against them pursuant to Federal Rules of Civil Procedure (FRCP) 12(b)(1), (2) and (6) on the ground that Plaintiff has not stated and cannot state claims for which relief can be granted, or, in the alternative, for a more definite statement pursuant to FRCP 12(e).

PROCEDURAL HISTORY

On July 20, 2005 Plaintiff filed his original complaint. On March 29, 2006, Plaintiff filed a motion for leave to amend his complaint. That motion was granted in part on April 12, 2006 allowing Plaintiff to amend his complaint to add an additional defendant and additional causes of action. Plaintiff subsequently filed his amended complaint on April 13, 2006 adding an additional defendant, additional causes of action, and an additional plaintiff.

INTRODUCTION

Plaintiff has failed in both his pleadings and his discovery to identify how Defendants allegedly violated CEMA, RCW § 1986, et seq. (collectively referred to as the Consumer Protection Act, or CPA for short), 15 U.S.C. § 7701 et seq. (collectively referred to as the “CAN-SPAM” act) and RCW § 19.170, et seq.

Defendants' Memorandum in Support of Motion to
Dismiss Plaintiff's First Amended Complaint - 5.
Z:\IP\Client\Ascensive LLC v.
Gordon\Pleadings\MotionDismissFirstAmendcomplaint.060927\MotionDismissFirst
Amended060518\MotionDismissFAC.MEMO Support Mtn Dismiss First
Amended Complaint 061003.wpd

LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE
Attorneys at Law
P.O. Box 6125
Kennewick, Washington 99336-0125
(509) 735-3581

1 (collectively referred to as the "Prize Statute"). In addition, the complaint fails to
2 specify either a time frame during which the violations are alleged to have occurred
3 or the number of e-mails alleged to have been sent by Defendants which violate the
4 above. Plaintiff simply claims "numerous" emails (Amended Complaint 3.6) to
5 "hundreds" of emails (Amended Complaint 4.1.1). In an attempt to understand the
6 precise allegations, Ascentive served discovery requests on or about December 6,
7 2005. Plaintiff provided a disc of about 600 e-mails but failed to identify how they
8 are related to this case. In general, plaintiff's responses were so evasive and
9 incomplete that they provided no information on the allegations contained in their
10 complaints. To date, Plaintiff has refused to properly respond to Ascentive's
11 discovery requests to the point that a discovery master had to be appointed. It is
12 apparent that Plaintiff is still grasping for enough information to prove his case at a
13 tremendous financial burden to the Defendants.
14

15 As noted above, on April 13, 2006, Plaintiff filed his amended complaint
16 naming one additional defendant, adding new causes of action, and adding an
17 additional plaintiff without the court's permission. Plaintiff changed the plaintiff from
18 James S. Gordon, Jr. to add a d/b/a Gordonworks.com. Plaintiff has completely
19 ignored the requirements of FRCP 15 by attempting to bring new causes of action
20 against Defendants on behalf of a d/b/a for which he failed to seek leave to add.
21 Further, it is believed that the d/b/a is not properly registered as a trade name making
22 Plaintiff unable to maintain an action in this state for Gordonworks.com.
23

24
25
26
27
28 Defendants' Memorandum in Support of Motion to
Dismiss Plaintiff's First Amended Complaint - 6.
Z :\ I P C l i e n t \ A s c e n t i v e _ L L C _ v.
Gordon\Pleadings\MotionDismissFirstAmendcomplaint.060927\MotionDismissFi
rstAmended060318\MotionDismissFAC.MEMO Support Mtn Dismiss First
Amended Complaint 061003.wpd

LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE
Attorneys at Law
P.O. Box 6125
Kennewick, Washington 99336-0125
(509) 735-3581

65

1

2

3

III. LEGAL ARGUMENT

4

A. Plaintiff Violated FRCP 15 by Adding a New Plaintiff "d/b/a 'Gordonworks.com.'" Without Permission

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

On or about April 12, 2006 this Court granted in part and denied in part Plaintiff's motion to amend the original complaint. In its order, the Court specifically denied Plaintiff's request to add new plaintiffs to the action. (Order, April 12, 2006.) Nonetheless, Plaintiff ignored the Court order and unilaterally changed the caption to read "d/b/a Gordonworks.com" in an attempt to transform his website into a plaintiff in the action. Further, contrary to the requirements of FRCP15, Plaintiff, in his motion to amend the original complaint, never sought leave of the Court to add "d/b/a Gordonworks.com" as a plaintiff in the action. Such blatant disregard of the Federal Rules and an order of this Court, and such deliberately improper tactics should not be rewarded, and each of Gordon's causes of action asserted on behalf of Gordonworks.com must be dismissed.

B. Plaintiff Lacks Standing to Bring an Action on Behalf of an Unregistered d/b/a (Trade Name).

Even if we assume that Gordon had been permitted by this Court to add new plaintiffs to the action, Gordon failed to properly register Gordonworks.com as a d/b/a ("trade name") as required by the State of Washington Department of Licensing. "Each person . . . who shall carry on, conduct or transact business in this state under any trade name shall register that trade name with the department of licensing. . . ." RCW §19.80.010(1). Pursuant to RCW §19.80.040, one must register a trade name in order to maintain a lawsuit on behalf of said business. In short, in light of the statutory provisions governing the registration of trade names, Gordonworks.com does not exist as a legal entity. Therefore, James S. Gordon, Jr. May not maintain an action

28

Defendants' Memorandum in Support of Motion to
Dismiss Plaintiff's First Amended Complaint - 7.
Z:\IPC\lient\Ascensive LLC v.
Gordon\Pleadings\MotionDismiss\FirstAmendcomplaint.060927\MotionDismissFi
rstAmended060518\MotionDismissFAC.MEMO Support Mtn Dismiss First
Amended Complaint 061003.wpd

LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE
Attorneys at Law
P.O. Box 6125
Kennewick, Washington 99336-0125
(509) 735-3581

kk

1 in the State of Washington on behalf of unregistered trade name, Gordonworks.com.
2 As a result, the court should dismiss each of Plaintiff's causes of action asserted on
3 behalf of Gordonworks.com

4

5 C. Plaintiff Lacks Standing to Bring a Cause of Action as an "Interactive
Computer Service" under CEMA and CPA.

6 As an individual, James S. Gordon, jr. clearly does not qualify as an "interactive
7 computer service" under CEMA. CEMA defines an "interactive computer service"
8 as "any information service, system, or access software provider that provides or
9 enables computer access by multiple users to a computer server, including specifically
10 a service or system that provides access to the internet and such systems operated or
11 services offered by libraries or educational institutions." RCW §19.190.010(5). In
12 addition to defining an "interactive computer service," CEMA was later amended to
13 define the terms "internet domain name" and "web page." RCW §19.190.010(5);
14 RCW §19.190.010(14). By providing distinct definitions for each term, the plain
15 language of the statute clearly states the legislative intent that an interactive computer
16 service is neither an internet domain name, nor a web page. Therefore, neither
17 Gordon, the individual, nor the internet domain name Gordonworks.com qualifies as
18 an interactive computer service, as defined by CEMA. There mere operation of a
19 website cannot transform Mr. Gordon into an interactive computer service.

20 In light of the foregoing, Plaintiff does not have statutory standing to assert his
21 Second and Third Causes of Action, except perhaps as an individual "recipient of a
22 commercial electronic mail message." RCW §19.190.040(1). Although the term
23 "recipient" is undefined in CEMA, the definition provided in Can-SPam is instructive.
24 Under the CAN-SPAM, the "recipient" of a commercial email message is defined as
25 the "authorized user of the electronic mail address to which the message was sent or
26 delivered." 15 U.S.C. §7702(14). Thus, Gordon only has standing, if at all, to bring

27
28 Defendants' Memorandum in Support of Motion to
Dismiss Plaintiff's First Amended Complaint - 8.
Z:\IPC\lient\Ascentive LLC v.
Gordon\Pleadings\MotionDismissFirstAmendcomplaint.060927\MotionDismissFi
rstAmended060518\MotionDismissFAC.MEMO Support Mtn Dismiss First
Amended Complaint 061003.wpd

LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE
Attorneys at Law
P.O. Box 6125
Kennewick, Washington 99336-0125
(509) 735-3581

1 his Second and Third Causes of Action based on emails sent to his personal email
2 address pursuant to RCW §19.190.040(1), and his Second and Third Causes of Action
3 brought pursuant to RCW §19.190.040(2) should be otherwise dismissed.

4

5 D. Plaintiff Lacks Standing to Bring a Cause of Action Under
6 CAN-SPAM.

7 CAN-SPAM adopts the definition provided in Section 231(3)(4) of the
8 Communications Decency Act of 1996 (the “CDA”), which defines “internet access
9 service” as “a service that enables users to access content, information, electronic mail
10 or other services offered over the Internet, and may also include access to proprietary
11 content, information, and other services as part of a package of services offered to
12 consumers.” 47 U.S.C. §231(e)(4); see 15 U.S.C. §7702(11). Common sense dictates
13 that James S. Gordon, Jr., an individual person, clearly is not an internet access service
14 as contemplated under CAN-SPAM.

15 “CAN-SPAM gives a private right of action to only ISPs . . . [t]here is no
16 private right of action for individuals, such as Mr. Gordon.” Kevin P. Cronin &
17 Ronald N. Weikers, Data Security & Privacy Law: Combating Cyberthreats §9:47:110
18 (2006). Similarly, there is no private right of action for Internet domain names, such
19 as Gordonworks.com. Other than the limited instances in which ISPs may bring an
20 action under CAN-SPAM, the provisions of CAN-SPAM are to be enforced by the
21 Federal Trade Commission (“FTC”). 15 U.S.C. §7706(a). Commonly known ISPs
22 who have been permitted to assert causes of action under CAN-SPAM include AOL,
23 Microsoft and Earthlink. Plaintiff, an individual, clearly cannot be categorized with
24 the likes of AOL, Microsoft and/or Earthlink, and is not an internet access service
25 (ISP) within the meaning of CAN-SPAM.

26 In light of the foregoing, Plaintiff’s First Cause of Action fails in its entirety
27 because there is no private right of action for individuals and/or Internet domain
28

Defendants’ Memorandum in Support of Motion to
Dismiss Plaintiff’s First Amended Complaint - 9.
Z:\IP Client\Ascensive LLC v.
Gordon\Pleadings\MotionDismissFirstAmendcomplaint.060927\MotionDismissFi
rstAmended060518\MotionDismissFAC.MEMO Support Mtn Dismiss First
Amended Complaint 061003.wpd

LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE
Attorneys at Law
P.O. Box 6125
Kennewick, Washington 99336-0125
(509) 735-3581

68

1 names under CAN-SPAM. Therefore, Plaintiff's First Cause of Action should be
2 dismissed with prejudice.
3

4 E. Plaintiff Fails to State a Claim and Lacks Standing to Bring an
Action Under the Prize Statute.

5 In his Fourth Cause of Action, Plaintiff makes a blanket allegation that
6 "numerous email advertisements . . . which Defendants transmitted to Plaintiff . . .
7 violated [the Prize Statute]." (Amended Complaint 4.3.2.) Plaintiff then proceeds to
8 parrot the requirements of RCW §19.170.030, inserting "and/or" in between each and
9 every subsection, leaving Defendants clueless as to which, if any, requirement they
10 are alleged to have violated. Similarly, Plaintiff parrots the requirements of RCW
11 §19.170.040 and simply states that Defendants failed to comply with each subsection.
12 Nowhere in his Fourth Cause of Action does Plaintiff allege that he suffered any
13 damage from the alleged violation(s), or that he even read or responded to any of the
14 emails alleged to include promotional advertising. The standing requirement to bring
15 a private cause of action under the Prize Statute is specifically stated therein: "[a]
16 person who suffers damage from an act of deceptive promotional advertising may
17 bring an action against the sponsor or promotion of the advertising, or both." RCW
18 §19.170.060(1) (emphasis added). According to the plain language of the statute,
19 Plaintiff, who does not allege to have suffered any damage as a result of an alleged act
20 of deceptive advertising, clearly fails to satisfy the standing requirement enumerated
21 in RCW §19.170.060(1). In light of the foregoing, Plaintiff's Fourth Cause of Action
22 should be dismissed with prejudice.
23

24 F. Plaintiff's Amended Complaint Should be Dismissed Pursuant to
FRCP 12(b)(6) for Failure to State a Claim.

25 Assuming for argument's sake that Plaintiff had standing to bring any of his
26 causes of action, he has failed to satisfy the basic pleading requirements of CR 8(a)
27 and FRCP 8(a). The original complaint consisted of vague and ambiguous blanket
28

Defendants' Memorandum in Support of Motion to
Dismiss Plaintiff's First Amended Complaint - 10.
Z:\V\IP\Client\Ascensive LLC v.
Gordon\Pleadings\MotionDismissFirstAmendcomplaint.060927\MotionDismissFi
rstAmended060518\MotionDismissFAC.MEMO Support Mtn Dismiss First
Amended Complaint 061003.wpd

LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE
Attorneys at Law
P.O. Box 6125
Kennewick, Washington 99336-0125
(509) 735-3581

1 allegations that Defendant violated “at least one” provision of CEMA. (Amended
2 Complaint 3.9.) Now again the amended complaint suffers from the same vagueness
3 and ambiguity. For example, Plaintiff alleges that “Defendants” sent “hundreds” of
4 emails in violation of CEMA (and CPA), and/or CAN-SPAM and/or the Prize Statute.

5 In order to survive a motion to dismiss under FRCP 12(b)(6), a “complaint must
6 contain either direct or inferential allegations respecting all the material elements to
7 sustain a recovery under some viable legal theory.” *Roe v. Nev.*, 332 F.Supp. 2d 1331,
8 1339 (D. Nev. 2004) (citing *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434
9 (6th Cir. 1988)). Although factual allegations set forth in the complaint “taken as true
10 and construed in the light most favorable to [p]laintiffs”, the Ninth Circuit has
11 elaborated on this rule, explaining that “courts should only accept as true the well-
12 pledged facts, and ignore ‘legal conclusions,’ ‘unsupported conclusions,’
13 ‘unwarranted inferences,’ ‘unwarranted deductions,’ ‘footless conclusions of law’ or
14 ‘sweeping legal conclusions case in the form of factual allegations.’” *Id.* (Emphasis
15 added) (citing *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th cir. 1996);
16 quoting *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)).

17 As Plaintiff himself points out, each alleged email constitutes a separate
18 transaction and therefore a separate claim. (See Amended Complaint 4.2.4, 4.2.5.)
19 Notwithstanding the foregoing, Plaintiff fails to identify anywhere in his pleading the
20 number of emails alleged to have been sent by Defendants in violation of each
21 separate and distinct provision of the aforementioned statutes. (Amended Complaint
22 4.1.1.-4.1.2, 4.1.3, 4.2.2., 4.2.3., 4.3.2.) Further, Plaintiff fails to separate each
23 allegations made on behalf of Gordonworks.com from those allegations asserted by
24 the recipient of an email. Rather, Gordon simply lumps his claims on behalf of
25 unregistered trade name Gordonworks.com together with his claims arising out of
26 being an individual recipient of email, alleging collectively that “Defendants”
27 transmitted emails to “Plaintiff.” (See Amended Complaint 4.2.3, 4.3.2.) Plaintiff

28 Defendants’ Memorandum in Support of Motion to
Dismiss Plaintiff’s First Amended Complaint - 11.
Z:\IPC\client\Ascentive LLC v.
Gordon\Pleadings\MotionDismissFirstAmendcomplaint.060927\MotionDismissFi
rstAmended060518\MotionDismissFAC.MEMO Support Mtn Dismiss First
Amended Complaint 061003.wpd

LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE
Attorneys at Law
P.O. Box 6125
Kennewick, Washington 99336-0125
(509) 735-3581

1 even fails to identify a time during which such alleged violations are alleged to occur.¹

2 Plaintiff's entire amended complaint consists of precisely those "facts" which
3 courts in the Ninth Circuit have suggested they should ignore – sweeping legal
4 conclusions that Defendants have violated CEMA, CPA, CAN-SPAM and/or the Prize
5 Statute, cast in the form of factual allegations. There are virtually no "well-pleaded"
6 facts for the Court to accept as true. Without limiting the foregoing, Defendants
7 address the following specific deficiencies and unsupported conclusions, *inter alia*,
8 in the order in which they appear in Plaintiff's amended complaint:

- 9 • Plaintiff fails to distinguish between alleged violations by the individual
10 defendants and alleged violations by the corporate defendant;
11 • Plaintiff states that he has received "hundreds of commercial email
12 messages from or on behalf of Defendants, sent to Plaintiff's electronic
13 mail server² located in Benton and Franklin Counties, Washington,
14 and/or its registered domain names, including 'gordonworks.com' in
15 violation of CAN-SPAM (Amended Complaint 4.1.1.), but fails to
16 identify the registered domain names alleged to have received emails, the
17 specific email addresses alleged to have received the emails, the
18 provision of CAN-SPAM alleged to have been violated or the factual
19 basis for his conclusion that each or any email received violated any

20
21 ¹In the absence of such basic information, Defendants are unable to determine, *inter alia*,
22 whether they are entitled to assert a statute of limitations defense. Based upon Plaintiff's Amended
23 Complaint it is unclear when the emails in question were sent, and is therefore possible that they
24 were sent before the enactment of the statutory provisions Plaintiff seeks to enforce.

25 ²Although Plaintiff claims in this action to own the server, in a separate action against
26 Virtumundo, Inc., gordon states that the server on which Gordonworks.com resides is owned by
27 third party Omni Innovations, LLC. However, in actuality, the domain Gordonworks.com is, upon
28 information and belief, hosted by Webmasters.com, on a server located in Tampa, Florida. (Ivey
Decl. ¶7; Ex. B.) In addition, upon information and belief, the internet domain server
ns.gordonworks.com has been assigned by the registrar, go Daddy Software, Inc., the Internet
Protocol ("IP") address 68.178.150.119, and this IP address is believed to be located in Scottsdale,
Arizona. (Ivey Decl. ¶9; Ex. B.)

28 Defendants' Memorandum in Support of Motion to
Dismiss Plaintiff's First Amended Complaint - 12.

Z :\ \ P C l i e n t \ A s c e n t i v e L L C \ v
Gordon\Pleadings\MotionDismissFirstAmendcomplaint.060927\MotionDismissFi
rstAmended060518\MotionDismissFAC.MEMO Support Mtn Dismiss First
Amended Complaint 061003.wpd

LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE
Attorneys at Law
P.O. Box 6125
Kennewick, Washington 99336-0125
(509) 735-3581

1 provision of CAN-SPAM;

2 • Plaintiff alleges that his unsubscribed requests “went unheeded for a
3 substantial amount of time” (Amended Complaint 4.1.2), but fails to
4 identify the email address(es) on behalf of which such requests were
5 sent, to whom such requests were sent and for how long such requested
6 allegedly “went unheeded” or the email from which the request arose:
7 • Plaintiff vaguely alleges that “at least one” email was sent by Defendants
8 to an address “most likely harvested from domain name registration
9 and/or by other means of anonymous information harvesting.”
10 (Amended Complaint 4.1.3.) It is unclear from this statement whether
11 Plaintiff is even alleging that he believes Defendants harvested “an
12 address.” Further, Plaintiff fails to identify the email address alleged to
13 have been harvested or the facts supporting his conclusion that such
14 email address was harvested.

15 Plaintiff has failed to properly state a claim under any of the statutory
16 provisions pursuant to which he attempts to bring his action. Instead, Plaintiff has
17 deliberately crafted a pleading consisting entirely of unsupported and sweeping legal
18 conclusions cast in the form of factual allegations. As a result, in line with previously
19 cited Ninth Circuit authority, Plaintiff’s amended complaint should be dismissed
20 under FRCP 12(b)(6).

21

22 G. If the Amended Complaint is not Dismissed, Plaintiff Should be
23 Required to Provide a More Definite Statement Pursuant to
FRCP 12(e).

24 With the filing of the amended complaint, Plaintiff continues his pattern of
25 filing vague and ambiguous pleadings. “If a pleading to which a responsive pleading
26 is permitted is so vague or ambiguous that a party cannot reasonably be required to
27 frame a responsive pleading, or if more particularity in the pleading will further the

28 Defendants’ Memorandum in Support of Motion to
Dismiss Plaintiff’s First Amended Complaint - 13.
Z:\IPC\client\Ascensive LLC v.
Gordon\Pleadings\MotionDismissFirstAmendcomplaint.060927\MotionDismissFi
rstAmended060918\MotionDismissFAC.MEMO Support Mtn Dismiss First
Amended Complaint 061003.wpd

LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE
Attorneys at Law
P.O. Box 6125
Kennewick, Washington 99336-0125
(509) 735-3581

72

1 economical disposition of the case, the party receiving the pleading may move for a
2 more definite statement before serving a responsible pleading.” CR 12(e) (emphasis
3 added). Although notice pleading requires only that the complaint contain a short and
4 plain statement showing that the plaintiff is entitled to relief (CR 8(a); FRCP 8(a)),
5 this does not dispense with the necessity, as occasion may require, for a statement of
6 certain details which would enable the defendant more readily to prepare and file a
7 responsive pleading. Fed. Proc. §62:421 (2006). In fact, unless facts are “simply and
8 concisely stated in lucid fashion, and support [plaintiff’s] conclusion” the action fails.
9 *Washburn, et al. v. Moorman Mfg. Co.*, 25 F.Supp. 546, (S.D. Cal. 1938).

10 Nowhere in the amended complaint does Plaintiff simply and concisely state
11 in lucid fashion the facts supporting the number of emails alleged to have been sent
12 by Defendants to Plaintiff or his belief that Defendants are responsible for sending the
13 alleged emails to Plaintiff. Plaintiffs amended complaint is intentionally replete with
14 vague and ambiguous allegations. To date, as a result of Plaintiff’s improper
15 pleading, over one (1) year into the action and over forty (40) docket entries later,
16 Defendants are no closer to being able to identify and defend the specific allegations
17 being lodged against them. As a result, Plaintiff’s action should fail under the Court’s
18 analysis in *Washburn*. However, if the Court does not dismiss the action, Plaintiff
19 should be required to provide a more definite statement.

20 In order to interpose a responsive pleading and to further the economical
21 disposition of the case, if necessary following this motion to dismiss, Defendants
22 require, at a minimum, the following additional details: the number of emails alleged
23 to have been sent in violation of each separate and distinct provision of CEMA and
24 CPA, CAN-SPAM and RCW §19.170, *et seq.*; the manner in which each email is
25 alleged to have violated any subsection of the aforementioned statutes (e.g., deceptive
26 subject line, etc.); to what specific email addresses each email is alleged to have been
27 sent; which claims are being asserted against the individuals and which claims are

28 Defendants’ Memorandum in Support of Motion to
Dismiss Plaintiff’s First Amended Complaint - 14.
Z:\JPC\client\Ascentive LLC v.
Gordon\Pleadings\MotionDismissFirstAmendcomplaint.060927\MotionDismissFi
rstAmended060518\MotionDismissFAC.MEMO Support Mtn Dismiss First
Amended Complaint 061003.wpd

LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE
Attorneys at Law
P.O. Box 6125
Kennewick, Washington 99336-0125
(509) 735-3581

73

1 being asserted against the corporate defendant; which claims are being asserted by
2 Plaintiff as an (alleged) interactive computer service, and which claims are being
3 asserted by Plaintiff as a recipient of an allegedly violative email.

4 In sum, if Plaintiff's action is not dismissed, Plaintiff should be required to state
5 for each and every email: 1) the email address to which it was sent; 2) the date on
6 which it was sent; 3) the specific ways in which the email is alleged to violate any
7 provision of any statute and the factual basis or bases for such a conclusion; and 4) the
8 factual basis upon which Plaintiff bases his conclusion that the email was sent or
9 initiated by or on behalf of a particular Defendant.

10 **IV. CONCLUSION**

11 In light of the foregoing arguments, Plaintiff's amended complaint should be
12 dismissed in its entirety or, at a minimum, Plaintiff should be required to provide a
13 more definite statement pursuant to FRCP 12(e). Defendants respectfully request that
14 the Court: 1) dismiss Plaintiff's First Amended Complaint with prejudice, and award
15 Defendants their costs and fees incurred in responding to Plaintiff's First Amended
16 Complaint; or 2) grant Defendants' motion for a more definite statement, and award
17 Defendants their costs and fees incurred in responding to Plaintiff's First Amended
18 Complaint.

19 DATED this 3rd day of October, 2006.

20 LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE

21 s/ Floyd E. Ivey
22 By s/ FLOYD E. IVEY
23 FLOYD E. IVEY, WSBA #6888
24 Counsel for Defendant
1141 N. Edison, Suite C
Kennewick, WA 99336

25 I hereby certify that on October 3, 2006, I electronically filed Defendants'
26 Memorandum in Support of Defendants' Motion to Dismiss Plaintiff's First
27 Amended Complaint with the Clerk of the Court using the CM/ECF System which
will send notification of such filing to Robert J. Siegel.

28 Defendants' Memorandum in Support of Motion to
Dismiss Plaintiff's First Amended Complaint - 15.
Z:\IPC\lient\Ascentive LLC v.
Gordon\Pleadings\MotionDismissFirstAmendcomplaint.060927\MotionDismissFi
rstAmended060518\MotionDismissFAC.MEMO Support Mtn Dismiss First
Amended Complaint 061003.wpd

LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE
Attorneys at Law
P.O. Box 6125
Kennewick, Washington 99336-0125
(509) 735-3581

S/ FLOYD E. IVEY
FLOYD E. IVEY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Defendants' Memorandum in Support of Motion to
Dismiss Plaintiff's First Amended Complaint - 16.
Z:\V\IP\Client\Ascentive LLC v.
Gordon\Pleadings\MotionDismissFirstAmendcomplaint.060927\MotionDismissFi
rstAmended060518\MotionDismissFAC.MEMO Support Mtn Dismiss First
Amended Complaint 061003.wpd

LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE
Attorneys at Law
P.O. Box 6125
Kennewick, Washington 99336-0125
(509) 735-3581

1 Floyd E. Ivey
2 Liebler, Ivey, Connor, Berry & St. Hilaire
3 1141 N. Edison, Suite C
4 P.O. Box 6125
5 Kennewick, WA 99336
Telephone (509) 735-3581
Fax (509) 735-3585
5 Attorneys for Defendant

Hon. Fred Van Sickle

6 Mr. Robert J. Siegel
1325 4th Ave Ste 940
7 Seattle, WA 98101-2509
Telephone (206) 624-9392
8 Fax (206) 624-0717
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

14 JAMES S. GORDON, JR., a married,
individual, d/b/a
15 'GORDONWORKS.COM',

NO. CV-05-5079-FVS

DECLARATION OF
FLOYD E. IVEY IN
SUPPORT OF DEFENDANT'S
MOTION TO DISMISS
PLAINTIFFS' FIRST
AMENDED COMPLAINT

Plaintiffs

vs.

20 ASCENTIVE, LLC, a Delaware limited
21 liability company; ADAM SCHRAN,
22 individually and as part of his marital
community; JOHN DOES I-X,

WITHOUT ORAL
ARGUMENT
Noted for Hearing
November

Defendant

Floyd E. Ivey, being counsel for Defendants herein and co-counsel in the Eastern District matter of Gordon v. Impulse, CV-04-5125-FVS, declares as follows:

1. With the exception of the matters alleged below as being based upon

Declaration of Floyd E. Ivey in support of Defendant's Motion to Dismiss Plaintiffs First Amended Complaint - 1.

LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE
Attorneys at Law
P.O. Box 6125
Kennewick, Washington 99336-0125
(509) 735-3581

1 information and belief, I am fully and personally familiar with the facts
2 and circumstances set forth herein. The Exhibits attached hereto as A, B and C,
3 are identical to those annexed to Defendant's Motion to Dismiss Plaintiff's First
4 Amended Complaint in the matter of Gordon v. Impulse.

5 2. Ths action was commenced by the filing of a summons and complaint
6 on July 20, 2005 against Ascentive LLC (the "Original Complaint").

7 3. The Original Complaint was vague in alleging that Ascentive had violated "at
8 least one" provision of RCW 19.190, *et seq.* (collectively referred to as "CEMA").

9 4. Plaintiff filed this First Amended Complaint on April 13, 2006.

10 5. Discovery in this matter has been referred to Discovery Master Harold Clarke.
11 Defendant Ascentive's Motion to Compel is noted before the Honorable Clarke on
12 October 17, 2006.

13 6. Despite ths Court's Order directly prohibiting Plaintiff from adding new
14 plaintiffs and in disregard of Fed. R. Civ. P. 15, Plaintiff amended
15 the caption to add "d/b/a Gordonworks.com" as a plaintiff. Plaintiff never sought
16 leave of the Court to add the alleged d/b/a Gordonworks.com as a plaintiff.
17 Further,upon information and belief, such d/b/a is not properly registered as a
18 trade name with the State of Washington Department of Licensing.

19 7. Both the Original Complaint and First Amended Complaint fail to specify
20 either a time frame during which such violations are alleged to have occurred, or
21 the number or emails alleged to have been sent by Defendants in violation of
22 CEMA, RCW 19.86, *et seq.* (collectively referred to as "CPA"), 15 U.S.C. 7701,
23 *et seq.* (collectively referred to as "CAN-SPAM") and/or RCW 19.170, *et seq.*
24 (collectively referred to as the "Prize Statute").

25 8. Plaintiff has not, in pleadings or in discovery, to identify how Defendants
26 allegedly violated CEMA, CPA, CAN-SPAM and/or the Prize Statute.

27 9. Plaintiffs averments in his action contradict those made by Plaintiff in

28

1 other actions. Specifically, although Plaintiff claims in his action to own the
2 server, in a separate action against Virtumundo, Inc. Plaintiff stated that the server
3 on which the domain name Gordonworks.com resides is owned by third-party
4 Omni Innovations, LLC. However, upon information and belief, Gordonworks
5 .com is hosted by Webmasters.com on a server located in Tampa, Florida. In
6 addition, the internet domain server ns.gordonworks.com has been assigned
7 Internet Protocol ("IP") address 68.178.150.119 by the domain name registrar Go
8 Daddy Software, Inc. This IP address is, upon information and belief, situated in
9 Scottsdale, Arizona. Attached hereto as Exhibit A is the DNS Lookup information
10 related to the domain name, server and IP address.

11 10. James S. Gordon, Jr. is a professional plaintiff, whose tendency to
12 exaggerate has already been noted by Judge Coughenour of the Western District of
13 Washington. Attached hereto as Exhibit B is a copy of Judge Coughenour's
14 decision in Gordon v. Virtumundo, Inc., Case No. CV06-0204JCC.

15 11. Plaintiff admitted on his website that he has "developed a system that
16 shifts the 'financial' burden from [himself] back to those who choose to send [him]
17 spam. Attached hereto as Exhibit C is a print out of Plaintiffs website from March
18 2004 obtained from Internet Archive's Wayback Machine, as well as information
19 about the Wayback Machine.

20 12. Plaintiffs scheme is further evidenced by the fact that, upon information
21 and belief, he has filed no fewer than eleven (11) lawsuits, not including the
22 present action, against email marketers since 2004.

23 The foregoing is true and correct to the best of my knowledge. Signed in
24 Kennewick, Washington this 3rd day of October, 2006.

25
26 S/FLOYD E. IVEY
27 FLOYD E. IVEY, WSBA 6888
28 Attorneys for Defendants

Declaration of Floyd E. Ivey in support of Defendant's Motion to
Dismiss Plaintiffs First Amended Complaint - 3.

LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE
Attorneys at Law
P.O. Box 6125
Kennewick, Washington 99336-0125
(509) 735-3581

1

2 I hereby certify that on October 3, 2006, I electronically filed **Declaration**
3 of **Floyd E. Ivey in support of Defendants' Motion to Dismiss Plaintiff's First**
4 **Amended Complaint** with the Clerk of the Court using the CM/ECF System
5 which will send notification of such filing to Robert J. Siegel.

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

S/ FLOYD E. IVEY
FLOYD E. IVEY

Declaration of Floyd E. Ivey in support of Defendant's Motion to
Dismiss Plaintiffs First Amended Complaint - 4.

LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE
Attorneys at Law
P.O. Box 6125
Kennewick, Washington 99336-0125
(509) 735-3581

79

Exhibit A

DNS Lookup: www.gordonworks.com ALL record

Generated by www.DNSstuff.com at 19:52:02 GMT on 30 Aug 2006.

Peer 1 Hosting Plans

High performance hosting plans from \$269.
Request a quote online
www.dedicatedhosting.com

Nibblers

Trumpf power tools New Tools and
Replacement parts
www.emaxaction.com

Free DNS Service

Flexible DNS service for every domain - .com,
.net, .org, and more
www.pairNIC.com

How I am searching:

Searching for www.gordonworks.com ALL record at h.root-servers.net [128.63.2.53]: Got referral to j.gtld-servers.net
Searching for www.gordonworks.com ALL record at j.gtld-servers.net. [192.48.79.30]: Got referral to ns2.gordonworks.com
Searching for www.gordonworks.com ALL record at ns2.gordonworks.com. [68.178.150.119]: Got CNAME of gordonworks.com
Searching for gordonworks.com ALL record at a.root-servers.net [198.41.0.4]: Got referral to D.GTLD-SERVERS.NET
Searching for gordonworks.com ALL record at D.GTLD-SERVERS.NET. [192.31.80.30]: Got referral to ns1.gordonworks.com
Searching for gordonworks.com ALL record at ns1.gordonworks.com. [68.178.150.119]: Reports mail.gordonworks.com

Answer:

Domain	Type	Class	TTL	Answer
gordonworks.com.	MX	IN	86400	mail.gordonworks.com. [Preference = 10] Primary DNS server: ns.gordonworks.com. Responsible Name: root@gordonworks.com. Serial: 1117646086
gordonworks.com.	SOA	IN	86400	Refresh: 10800 (3h) Retry: 3600 (1h) Expire: 604800 (1w) Minimum/NegTTL: 86400 (1d)
gordonworks.com.	NS	IN	86400	ns.gordonworks.com.
gordonworks.com.	A	IN	86400	68.178.150.119
mail.gordonworks.com.	A	IN	86400	68.178.150.119
ns.gordonworks.com.	A	IN	86400	68.178.150.119

NOTE: One or more CNAMEs were encountered. www.gordonworks.com is really gordonworks.com.

There is no need to refresh the page -- to see the DNS traversal, to make sure that all DNS servers are reporting the same results, you can [Click Here](#).

Note that these results are obtained in real-time, meaning that these are not cached results.
These results are what DNS resolvers all over the world will see right now (unless they have cached information).

Note about ANY/ALL lookups: The ANY/ALL record type is designed to show every DNS record for a hostname. We display all DNS records that are returned to us. There are two catches to ANY/ALL lookups, however. The first is that it only returns DNS records for the hostname that you enter, so if you enter 'example.com' you will see the A record for example.com and MX record for example.com, but you will not see the A record for www.example.com (this isn't possible without a zone transfer, which normally requires special permission). The other catch is that some DNS servers are unfortunately set up to 'lie', and not return all the DNS records for a hostname. This behavior is the same no matter what you use to do the DNS lookup.

81

WHOIS results for 68.178.150.119

Generated by www.DNSstuff.com

Location: United States [City: Scottsdale, Arizona]

NOTE: More information appears to be available at NOC124-ARIN.Using 0 day old cached answer (or, you can [get fresh results](#)).

Displaying E-mail address (use sparingly -- this will make it more likely that you will trigger our rate limiting system).

OrgName: Go Daddy Software, Inc.
 OrgID: GDS-31
 Address: 1455 N Hayden Road
 Address: Suite 226
 City: Scottsdale
 StateProv: AZ
 PostalCode: 85260
 Country: US

NetRange: 68.178.128.0 - 68.178.255.255
 CIDR: 68.178.128.0/17
 NetName: GO-DADDY-SOFTWARE-INC
 NetHandle: NET-68-178-128-0-1
 Parent: NET-68-0-0-0
 NetType: Direct Allocation
 NameServer: CNS1.SECURESERVER.NET
 NameServer: CNS2.SECURESERVER.NET
 Comment:
 RegDate: 2005-04-12
 Updated: 2005-11-11

RAbuseHandle: ABUSE51-ARIN
 RAbuseName: Abuse Department
 RAbusePhone: +1-480-624-2505
 RAbuseEmail: abuse@godaddy.com

RNOCHandle: NOC124-ARIN
 RNOCCName: Network Operations Center
 RNOCPhone: +1-480-505-8809
 RNOCEmail: noc@godaddy.com

OrgAbuseHandle: ABUSE51-ARIN
 OrgAbuseName: Abuse Department
 OrgAbusePhone: +1-480-624-2505
 OrgAbuseEmail: abuse@godaddy.com

OrgNOCHandle: NOC124-ARIN
 OrgNOCName: Network Operations Center
 OrgNOCPhone: +1-480-505-8809
 OrgNOCEmail: noc@godaddy.com

OrgTechHandle: NOC124-ARIN
 OrgTechName: Network Operations Center
 OrgTechPhone: +1-480-505-8809
 OrgTechEmail: noc@godaddy.com

ARIN WHOIS database, last updated 2006-06-29 19:10
 # Enter ? for additional hints on searching ARIN's WHOIS database.

When the server was last reloaded, we had 294080 IP addresses banned. We encourage you to view these pages in a browser or with get/extension.
 You are not allowed to use automated programs to access this information, or you may be fined.

(C) Copyright 2004-2006 DNSstuff.com

MOTNHA4 DECL - 7

1 of 1

8/30/2006 3:52 PM

52

City From IP

Generated by www.DNSstuff.com

[Buy Blue Coat Appliances](#)

Complete selection of Blue Coat Proxy & Anti-Spyware Appliances
www.EdgeBlue.com

[Proxy Server](#)

Half the global 500 uses HP Integrity servers—See why
www.Itanium-Integrity.com

IP: 68.178.150.119
Country: United States
City: Scottsdale, Arizona

Country Code: US
Currency: USD [United States Dollars]
Private IP? No
Known Proxy? No

Want to know more about geolocation? Check out our [geolocation FAQ](#), or you can buy the geolocation database we use (for city, region, and country) from [IP2Location](#).

Look up another IP: [Find City](#)

When the server was last reloaded, we had 294080 IP addresses banned. We encourage you to view these pages in a browser or [widget/extension](#).

You are not allowed to use automated programs to access this information, or you may be [fined](#).

(C) Copyright 2000-2006 DNSstuff.com

MOYNIHAN DECL - 8

1 of 1

8/30/2006 3:55 PM

83



BobParsons.com
GoDaddy pulls its IPO filing!
We have our best Qtr ever!
Why I decided to pull it.

Merchant Accounts
YES! Accept
credit cards
online!

GoDaddy.com Security
Protect yourself from
hackers, spam, scams and
more.

LISTEN TO
Life Online™ with
BOB PARSONS
TODAY!

Domains Hosting & Servers Email Site Builders Business SSL Certificates Domain Auctions Reseller Plans

[Free African American Art](#)
Free Educational Series About African
American Artists. Act Now!
Ontheweb-offer.com

[Two Free Poker Books](#)
Get Phil Gordon's Little Green Book or your
choice of any 2 poker books
ThePokerDeal.com

[Au Petit Bonheur](#)
Galerie d'art Art gallery
www.auplbtbonheur.com

GORDONWORKS.COM

The data contained in GoDaddy.com, Inc.'s WHOIS database, while believed by the company to be reliable, is provided "as is" with no guarantee or warranties regarding its accuracy. This information is provided for the sole purpose of assisting you in obtaining information about domain name registration records. Any use of this data for any other purpose is expressly forbidden without the prior written permission of GoDaddy.com, Inc. By submitting an inquiry, you agree to these terms of usage and limitations of warranty. In particular, you agree not to use this data to allow, enable, or otherwise make possible, dissemination or collection of this data, in part or in its entirety, for any purpose, such as the transmission of unsolicited advertising and solicitations of any kind, including spam. You further agree not to use this data to enable high volume, automated or robotic electronic processes designed to collect or compile this data for any purpose, including mining this data for your own personal or commercial purposes.

Please note: the registrant of the domain name is specified in the "registrant" field. In most cases, GoDaddy.com, Inc. is not the registrant of domain names listed in this database.

Registrant:
James S. Gordon, Jr.
9804 Buckingham Drive
Pasco, Washington 99301
United States

Registered through: GoDaddy.com, Inc. (<http://www.godaddy.com>)
Domain Name: GORDONWORKS.COM
Created on: 19-May-98
Expires on: 18-May-07
Last Updated on: 01-Oct-05

Administrative Contact:
Gordon, Jim jim@gordonworks.com
1419 Jedwin Avenue
Richland, Washington 99352
United States
5092101069

Technical Contact:
Support, Technical support@webmasters.com
Webmasters.com
4465 W. Gandy Blvd., Suite 80
Tampa, Florida 33611
United States
8775655555

Domain servers in listed order:
NS1.GORDONWORKS.COM
NS2.GORDONWORKS.COM

Registry Status: REGISTRAR-LOCK

MOVINMANDECL - 9

1 of 2

8/30/2006 3:57 PM

Search again
 Enter a domain name:
.com

More About Domains
 Compare our prices
 Why our prices are so low
 Transfer your domain to
GoDaddy.com for just \$6.95! Includes
a 1-year extension.
 Find out what this domain is worth

Available TLDs
 GORDONWORKS.NET \$8.99/yr
 GORDONWORKS.ORG \$8.99/yr
 GORDONWORKS.INFO \$5.99/yr
SAVE!
 GORDONWORKS.BIZ \$6.99/yr
SAVE!
 GORDONWORKS.US \$5.99/yr
SAVE!
 GORDONWORKS.NAME \$9.99/yr
 GORDONWORKS.TV \$34.99/yr
 GORDONWORKS.CC \$19.99/yr

You might also consider:
 GORDONWORKSONLINE.COM \$8.95/yr
 ONLINEGORDONWORKS.COM \$8.95/yr
 GORDONWORKSHOME.NET \$8.99/yr
 HOMEGORDONWORKS.NET \$8.99/yr
 GORDONWORKSSITE.ORG \$8.99/yr
 SITEGORDONWORKS.ORG \$8.99/yr
 GORDONWORKSWEB.INFO \$5.99/yr
SAVE!
 WEBGORDONWORKS.INFO \$5.99/yr
SAVE!
 GORDONWORKSLIVE.BIZ \$6.99/yr
SAVE!
 LIVEGORDONWORKS.BIZ \$6.99/yr
SAVE!

84

Registry Status: clientDeleteProhibited
Registry Status: clientRenewProhibited
Registry Status: clientTransferProhibited
Registry Status: clientUpdateProhibited

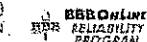
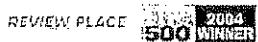
[See Underlying Registry Data](#)
[Report Invalid Whois](#)

24/7 Sales and Support: (480) 505-8877

Billing Questions? Call (480)505-8856

Free Email Updates! Enter address

[Home](#) | [Contact Us](#) | [Catalog](#) | [Cart](#) | [How to Pay](#) | [Legal](#) | [Report Spam](#) | [Jobs](#) | [Site Index](#) | [Whois](#) | [Affiliates](#) | [Link to Us](#)



GoDaddy.com is the world's No. 1 ICANN-accredited domain name registrar for .COM, .NET, .ORG, .INFO, .BIZ and .US domain extensions. Source: Name Intelligence, Inc. 2006

Copyright © 1999 - 2006 GoDaddy.com, Inc. All rights reserved.

85

Exhibit B

Westlaw.

Slip Copy

Slip Copy, 2006 WL 1495770 (W.D.Wash.)
(Cite as: Slip Copy)

Page 1

C

Briefs and Other Related Documents

Only the Westlaw citation is currently available.

United States District Court, W.D. Washington.
James S. GORDON, Jr., a married individual, d/b/a
'Gordonworks.com'; Omni Innovations, LLC., a
Washington limited liability company, Plaintiffs,
v.

VIRTUMUNDO, INC., a Delaware corporation,
d/b/a Adknowledgeemail.com; Adknowledge, Inc., a
Delaware corporation, d/b/a Aknowledgemail.com;
Scott Lynn, an individual; and John Does, I-X,
Defendants.

No. CV06-0204JCC.

May 24, 2006.

Robert J. Siegel, Merkle, Siegel & Friedrichsen,
Seattle, WA, for Plaintiffs.
Derek Alan Newman, Newman & Newman, Seattle,
WA, for Defendants.

ORDER

COUGHENOUR, J.

*1 This matter has come before the Court on Defendants' Motion to Dismiss for Lack of Personal Jurisdiction under Rule 12(b)(2) (Dkt. No. 8), Plaintiffs' Opposition thereto (Dkt. No. 11), and Defendants' Reply (Dkt. No. 17). The Court has considered the briefs, declarations, and exhibits submitted by the parties and determined that oral argument is not necessary. For the reasons that follow, the Court DENIES Defendants' motion to dismiss.

I. BACKGROUND

Plaintiffs James S. Gordon, Jr. ("Gordon") and Omni Innovations, LLC ("Omni") have brought this action for alleged violations of the Federal Can-Spam Act of 2003, 15 U.S.C. § 7701-11, the Washington Commercial Electronic Mail Act ("CEMA"), Wash. Rev. Code 19.190.010-110, and the Washington Consumer Protection Act. Gordon is a Washington resident and registrant of the internet domain gordonworks.com ("Gordonworks"). Gordonworks is an interactive computer service and internet access service that, among other functions, provides e-mail accounts to individuals. (Am.Compl.(Dkt. No. 15) ¶ 3.4.) The internet domain server on which the

Gordonworks domain resides is owned by Omni. ^{FN1}

^{FN1}. Unless otherwise indicated, this Order's references to "Plaintiffs" includes both Gordon and Omni.

Defendants Virtumundo, Inc. ("Virtumundo") and Adknowledge, Inc. ("Adknowledge") are non-Washington-resident businesses that provide online marketing services to third-party clients. Virtumundo is a Delaware corporation with its principal place of business in Kansas. Adknowledge is also a Delaware corporation with its principal place of business in Missouri. Virtumundo and Adknowledge are separate corporate entities and currently have no relationship with one another.^{FN2} Virtumundo and Adknowledge market products for their clients by transmitting e-mails to interested consumers. Their services are permission-based-meaning that consumers must voluntarily provide their contact information to the companies and must also specify the subject matter of the ads that they are interested in receiving. In the past two years, Virtumundo has derived a portion of revenue from business activities conducted in Washington. Defendant Scott Lynn ("Lynn") is a Missouri citizen and serves as Chief Executive Officer of Defendant Adknowledge. He is also the sole shareholder of both companies.^{FN3}

^{FN2}. Defendants specifically state that "Adknowledge, Inc. and Virtumundo, Inc. are two separate corporate entities and currently have no relationship to each other." (Defs' Mot., Brandt Decl. ¶ 7 (emphasis added).) Defendants do not address whether the two entities *formerly* had a relationship to one another. Plaintiffs' allegations are that some relationship did exist between the two.

^{FN3}. Unless otherwise indicated, this Order's references to "Defendants" includes Adknowledge, Virtumundo, and Lynn.

Plaintiff Gordon alleges that between August 21, 2003, and February 15, 2006, he received approximately 6000 misleading, unsolicited e-mail ads from Defendants that were transmitted through Omni's domain server to his e-mail address "james@gordonworks.com," ^{FN4} as well as to other

57

Slip Copy
Slip Copy, 2006 WL 1495770 (W.D.Wash.)
(Cite as: Slip Copy)

Page 2

individuals using Gordonworks for domain hosting. (Pls.' Opp'n, Gordon Decl. ¶ 10; Am. Compl. ¶ 3.7.) Gordon alleges that he has sent approximately 200 direct e-mail requests to various Virtumundo e-mail addresses to cease transmission of all e-mails, but that the e-mails nevertheless persisted, even after the filing of the present action.^{FN4} These e-mails allegedly were sent to various addresses under the Virtumundo domain name.^{FN5}

FN4. The record is not clear as to precisely how these e-mails were procured. While Plaintiff Gordon alleges that he had no prior business relationship with either Virtumundo or Adknowledge, he also states that he was "tricked" into subscribing to various prize websites.

FN5. Defendants point out, and the Court has noted, Plaintiffs' tendency to exaggerate claims in its briefing. (E.g., compare Pls.' Opp'n 3 (claiming to have sent "literally thousands" of cease-and-desist e-mails), with Pls.' Opp'n, Gordon Decl. ¶ 7 (claiming to have sent 200 cease-and-desist e-mails).) While these exaggerations and inconsistencies are not fatal to Plaintiffs' efforts to defeat the instant motion, the Court is concerned with Plaintiffs' imprecision in their representations to the Court. Plaintiffs' Counsel is instructed to ensure that future filings comply with the dictates of Federal Rule of Civil Procedure 11(b).

FN6. The addresses were abuse@virtumundo.com, legal@virtumundo.com, postmaster@virtumundo, and webmaster@virtumundo.com. Defendants deny ever having received these e-mails. Plaintiff Gordon alleges, however, that the e-mails never "bounced" back to him, suggesting that Defendant Virtumundo did receive these e-mails.

II. ANALYSIS

A. Applicable Legal Standards

*2 When a district court acts on a defendant's motion to dismiss without holding an evidentiary hearing, the plaintiff must only make a *prima facie* showing of

jurisdictional facts to withstand the motion to dismiss. *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1168 (9th Cir.2005). Under this standard, the plaintiff must provide evidence that, if believed, would support jurisdiction over the defendant. *Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1129 (9th Cir.2003). Unless directly controverted, a plaintiff's version of the facts is to be taken as true. *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir.2001). Conflicts between the facts contained in the parties' affidavits, as well as all reasonable inferences, must be resolved in the plaintiff's favor. *Id.*

In order for a court to exercise jurisdiction over nonresident defendants, jurisdiction must be conferred by an applicable rule or statute. *Sec. Investor Prot. Corp. v. Vigman*, 764 F.2d 1309, 1313-14 (9th Cir.1985). Where, as here, there is no applicable federal statute governing personal jurisdiction, the district court applies the law of the state in which the district court sits. *Fed. R. Civ. P. 4(k)(1)(A); Harris Rutsky & Co. Ins. Servs. Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1129 (9th Cir.2003). In addition, an assertion of jurisdiction must accord with constitutional principles of due process. *Id.* Federal due process requires that a nonresident defendant have minimum contacts with the forum state of such a nature that the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). The constitutional test may be satisfied by showing that (1) the defendant has "substantial" or "continuous and systematic" contacts with the forum state, or (2) there is a strong relationship between the defendant's forum contacts and the cause of action. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 839 (9th Cir.1986). The former is known as "general" jurisdiction and the latter as "specific" jurisdiction. See *Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir.1995).

B. General Jurisdiction

A court may constitutionally assert general jurisdiction over a nonresident defendant only when the defendant's contacts with the forum state are so substantial and of such a nature as to justify suit in the forum state, even if the cause of action before the court arises from dealings entirely distinct from those activities. *Int'l Shoe Co.*, 326 U.S. at 318. Plaintiffs have not opposed Defendants' general jurisdiction



Slip Copy
Slip Copy, 2006 WL 1495770 (W.D.Wash.)
(Cite as: Slip Copy)

Page 3

argument. Accordingly, this Court will only address the issue of specific personal jurisdiction.

C. Specific Jurisdiction

This Court may only exercise specific jurisdiction over a nonresident defendant if jurisdiction is proper under Washington's long-arm statute and comports with federal due process principles. Washington's long-arm statute, Revised Code of Washington section 4.28.185, permits the assertion of personal jurisdiction to the extent permitted by due process, except where limited by the terms of the statute. *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 269 (9th Cir. 1995) (citing *Deutsch v. W. Coast Mach.*, 80 Wash.2d 707, 497 P.2d 1311, 1314 (Wash. 1972)). Accordingly, "the statutory and constitutional standards merge into a single due process test." *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 380 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991). The Ninth Circuit has held that in order to establish specific jurisdiction, a plaintiff must demonstrate that (1) the defendant has *purposefully availed* itself of the privilege of conducting activities in the state; (2) the claim *arises out of* or results from the defendant's forum-related activities; and (3) the exercise of jurisdiction would be *reasonable*. *Omeluk*, 52 F.3d at 270.

1. Purposeful Availment

*3 The purposeful availment requirement ensures that Defendants will not be "haled into a jurisdiction through random, fortuitous, or attenuated contacts." *Ziegler*, 64 F.3d at 473 (internal quotation omitted). In cases involving the assertion of personal jurisdiction primarily on the basis of internet activity, the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of the commercial activity over the internet. *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997). In addition, in tort cases, personal jurisdiction may attach if an out-of-forum defendant merely engages in conduct aimed at, and having effect in, the situs state. *Ziegler*, 64 F.3d at 473.

At the outset, the Court notes that it is the nonresident defendant's contacts with the *forum state* that are relevant for purposes of a personal jurisdiction analysis. See *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1207

(9th Cir. 2006) ("In any personal jurisdiction case we must evaluate *all* of a defendant's contacts with the *forum state*") (emphasis added). Merely demonstrating that a nonresident defendant has limited-or no-contacts with a *particular plaintiff* does not dispose of the personal jurisdiction inquiry. Having clarified that it is Defendants' contacts with the state of Washington, and not merely contacts with Plaintiffs, that are significant, the Court finds that Plaintiffs have made a *prima facie* showing that Defendants' internet activity amounts to purposeful availment in Washington, as follows.

Plaintiffs have alleged that each defendant "aided, abetted, assisted, and conspired with the acts of each other defendant" (Am.Compl. ¶¶ 1.6, 3.7), which has caused Plaintiffs to receive thousands of unsolicited e-mails through the Gordonworks domain. Defendants have attempted to attack the credibility of Plaintiffs' evidence, but otherwise have not directly controverted the allegations that they are sending mass unsolicited e-mails to Washington citizens. Rather, both Virtumundo and Adknowledge have directed-and continue to direct-marketing e-mails to Washington residents and are thus purposefully availing themselves of the forum state in a "knowing and repeated" manner through commercial transmissions over the internet. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D.Pa. 1997) ("If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper.").

Defendants' authority to the contrary is not on point. Defendants rely heavily on the recent Ninth Circuit opinion *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, in arguing that e-mail, like an internet website, is of a "passive nature" and can be accessed from locations outside of Washington. While both an internet website and e-mail may transmit information in analogous manners, the nature of the alleged unlawful conduct at issue here renders the comparison to *Cybersell* inappropriate because Defendants are alleged to have sent *thousands* of unsolicited e-mails to Plaintiff Gordon and other Washington residents. In contrast, *Cybersell* did not involve e-mail spammers. Defendants also cite a number of cases holding that contacts through e-mail, telephone, and fax are insufficient in and of themselves to constitute sufficient minimum contacts for the assertion of personal jurisdiction. (Defs.' Mot. 7, 10-12.) Several of these cases involve mere correspondence by e-mail, rather than e-mail of a

Slip Copy

Slip Copy, 2006 WL 1495770 (W.D.Wash.)

(Cite as: Slip Copy)

Page 4

commercial nature, as alleged here. Such cases are thus inapposite to Defendants' arguments. Furthermore, even in those cases involving the transmission of commercial e-mails, the issue before the court was whether a *single* commercial e-mail, rather than thousands of commercial e-mails, constituted a sufficient contact for the assertion of personal jurisdiction.

*4 Not only have Defendants reached into Washington by sending mass e-mails, both Virtumundo and Adknowledge acknowledge that they have generated revenue from business activity conducted in Washington.^{FN7} Such revenue-generation from Washington further supports the conclusion that Defendants are “‘purposefully deriv[ing] benefit’ from their interstate activities.” *Burger King v. Rudzewicz*, 471 U.S. 462, 473, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (quoting *Kulko v. California Superior Court*, 436 U.S. 84, 96, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978)); see also *Easter v. Am. W. Fin.*, 381 F.3d 948, 961 n. 7 (9th Cir.2004) (noting the significance of deriving income from the forum state in the purposeful availment analysis).

^{FN7} Virtumundo has admitted that in 2004, 0.04% of its revenue was generated from Washington, and that in 2005, it derived 0.16% of its revenue from Washington. (Defs.' Mot., Brandt Decl. ¶ 22.) Adknowledge does not provide specific figures and only states that it “does not generate any substantial percentage of its revenues from consumers” in Washington. (*Id.*, Geroe Decl. ¶ 11.) While Adknowledge may not, in its opinion, derive “substantial” revenue from Washington consumers, its statement necessarily implies that it does derive some amount of revenue from e-mail activity directed at Washington.

Defendants' attempts to distance themselves from Washington are insufficient to defeat Plaintiffs' *prima facie* showing of jurisdiction. Adknowledge, for example, argues that it goes to lengths to remove consumers who self-report a Washington address from its e-mail lists in the hopes of minimizing contacts with Washington. (Defs.' Mot., Geroe Decl. ¶¶ 12-16.) These efforts reportedly began in 2004. However, Gordon has alleged that he already had begun receiving unsolicited e-mails as early as August 2003. Adknowledge's efforts to remove Washington e-mail addresses in 2004 has no bearing on its alleged contacts prior to that date, and

Adknowledge offers no evidence suggesting that it was not knowingly sending e-mails to Washington residents before these changes were implemented. Further, while the evidence and briefing with respect to Adknowledge's actual business activity is not as developed as that regarding Virtumundo,^{FN8} Plaintiffs have specifically alleged Adknowledge's participation in the allegedly unlawful conduct. (See Am. Compl. ¶ 3.7.) Significantly, Defendants have not directly controverted these allegations, and, in fact, have acknowledged that both Virtumundo and Adknowledge have generated revenue from Washington. The Court is satisfied that Plaintiffs have sufficiently demonstrated that Adknowledge and Virtumundo purposefully availed themselves of the Washington forum.

^{FN8} As the Court noted *supra* note 2, Defendants have only alleged that Virtumundo and Adknowledge are separate corporate entities that *currently* have no relationship to each other, but Defendants have remained silent as to whether a business relationship existed in the past. In light of Plaintiffs' allegations that Defendants took concerted steps to send unsolicited e-mail to Plaintiff Gordon and other Washington residents in as early as August 2003, the fact that Virtumundo and Adknowledge have no current business relationship merely begs the question as to the existence of a prior relationship, particularly during any portion of the time period at issue in this lawsuit.

Defendants' arguments that Plaintiffs have failed to provide specific evidence with respect to Defendant Lynn are also unpersuasive. “There is no bar to exercising personal jurisdiction over officers and employees of a non-resident corporation if they ha[ve] the requisite minimum contacts.” *Calder v. Jones*, 465 U.S. 783, 790, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). Plaintiffs have alleged that Defendant Lynn is the Chief Executive Officer (“CEO”) of Adknowledge and the sole shareholder of *both* entities. (Am.Compl. ¶ 1.4.) Lynn is also alleged to have had knowledge of, directed, and authorized Virtumundo's and Adknowledge's allegedly illegal actions. (*Id.*) A corporate officer can be personally liable for torts which he authorizes or directs or in which he participates. *Coastal Abstract Serv. Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 734 (9th Cir.1999); *accord Johnson v. Harrigan-Peach Land Dev. Co.*, 79 Wash.2d 745, 489 P.2d 923

Slip Copy
Slip Copy, 2006 WL 1495770 (W.D.Wash.)
(Cite as: Slip Copy)

Page 5

(Wash.1971). Defendants have provided no evidence to the contrary, except to suggest that Defendant Lynn is the CEO only of Adknowledge. While Defendants are correct in arguing that each defendant's contacts with the forum state must be assessed individually, *Calder*, 465 U.S. at 790. Defendants have not provided any evidence from which the Court can conclude that Defendant Lynn has insufficient contacts with the forum state to support the assertion of jurisdiction over him as an individual in the present case, other than to make a conclusory argument that Plaintiffs have failed to make a *prima facie* showing of personal jurisdiction. Defendants have failed to directly controvert Plaintiffs' allegations supporting jurisdiction over Defendant Lynn. The foregoing applies to the John Doe Defendants as well.

*5 Finally, Defendants attempt to argue that they did not purposefully avail themselves of the privilege of doing business in Washington because neither Gordon's e-mail address, nor the e-mail addresses of other Washington residents receiving Defendants' marketing e-mails, include any information designating the location of the recipient. As a result, Defendants argue, such e-mail could not have been targeted at a particular geographic location. Several courts have considered and rejected similar arguments in the context of lawsuits involving bulk unsolicited e-mail. See, e.g., *Verizon Online Servs., Inc. v. Ralsky*, 203 F.Supp.2d 601 (E.D.Va.2002); *State v. Heckel*, 122 Wash.App. 60, 93 P.3d 189 (Wash.Ct.App.2004). For example, in *Heckel*, the Washington State Attorney General brought suit against an individual for alleged violations of Washington's CEMA. After the trial court imposed a permanent injunction and a civil penalty on the defendant, he appealed the trial court's decision arguing, *inter alia*, that the State failed to prove that he knew that specific e-mail addressees were registered to Washington residents. The *Heckel* court rejected this argument, noting that the defendant's argument, if taken to its logical conclusion, would produce the impracticable result of shielding offenders from liability simply where they "had no specific knowledge about particular recipients." *Heckel*, 93 P.3d at 192-93.

Similarly, in *Ralsky*, Verizon Online Services brought suit against a group of defendants in Virginia for an alleged conspiracy to transmit millions of unsolicited bulk e-mail messages to Verizon's member database through Verizon's proprietary online network. In support of their argument that a court in Virginia could not constitutionally assert

personal jurisdiction, the defendants claimed that they did not know that their unsolicited bulk e-mail messages would harm servers located in Virginia, and therefore that they could not have purposefully availed themselves of the forum. The *Ralsky* court squarely rejected this argument, noting that such an argument "would allow spammers to send UBE with impunity, avoiding personal jurisdiction simply by alleging that they did not know the exact location of an ISP's e-mail servers." *Ralsky*, 203 F.Supp.2d at 620. In particular, the *Ralsky* court was unwilling to permit tortfeasors to "escape personal jurisdiction for deliberate acts by simply pleading ignorance of where the harm of [the] action would lie." *Id.* at 620 n. 13. To do so, the court reasoned, would be "fundamentally unfair." *Id.* at 622.

Like the defendants in *Heckel* and *Ralsky*, Defendants' attempts in the present case to sidestep jurisdiction by pleading ignorance are unpersuasive. Although Virtumundo's and Adknowledge's e-mail lists might not plainly indicate to which states the e-mails are being sent, both Virtumundo and Adknowledge admit that they are aware of certain portions of their revenue coming from Washington. Further, Adknowledge's attempts to *reduce* the number of e-mails sent to Washington starting in 2004 clearly shows known e-mail contact with Washington both before and after those measures were implemented. Additionally, Defendants have, at all times, had access to the Washington Association of Internet Service Providers registry of e-mail addresses, which Washington courts have recognized as a valid means for ascertaining whether a particular e-mail address is owned by a Washington resident. See *Heckel*, 93 P.3d at 69-70.

*6 For the foregoing reasons, the Court finds that Defendants have "purposefully availed" themselves of this Washington forum.

2. "Arises Out Of"

The Court must next determine whether the claims made against Defendants arise out of their Washington-related activities. In making this determination, the Court considers whether Plaintiffs' claims would have arisen "but for" Defendants' contacts with Washington. *Harris Rutsky*, 328 F.3d at 1131-32. As noted *supra*, Defendants have not directly controverted Plaintiffs' allegations that Plaintiff Gordon received from Defendants thousands of unsolicited e-mails sent to him in Washington. But for Defendants' conduct, Plaintiffs' alleged injury

Slip Copy
Slip Copy, 2006 WL 1495770 (W.D.Wash.)
(Cite as: Slip Copy)

Page 6

would not have occurred. The Court finds that Plaintiffs' claims arise out of Defendants' Washington-related activities.

3. Reasonableness

"Once it has been established that a defendant purposefully established minimum contacts with a forum ... 'he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable' in order to defeat personal jurisdiction." *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1114 (9th Cir.2002). Assessing the reasonableness of asserting jurisdiction prevents the use of jurisdictional rules "in such a way as to make litigation 'so gravely difficult and inconvenient' that a party unfairly is at a 'severe disadvantage in comparison to his opponent.'" *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1487 (9th Cir.1993) (citing *Burger King*, 471 U.S. at 478)). The Court examines seven factors to determine whether the exercise of jurisdiction is reasonable:

(1) the extent of the defendants' purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendants' state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

Id. at 1487-88. No factor is dispositive in itself; the Court must balance all seven. *Roth v. Garcia Marquez*, 942 F.2d 617, 623 (9th Cir.1991).

Defendants argue that the exercise of jurisdiction would be unreasonable on three grounds. First, Defendants argue that jurisdiction would not be reasonable in the present case because they have not purposefully interjected themselves into Washington state affairs. However, Plaintiffs allege, and Defendants do not directly controvert, that Defendants have transmitted thousands of unsolicited e-mails to Plaintiff Gordon and other Washington residents. Furthermore, Defendants have knowingly engaged in acts aimed at Washington residents because they have admitted that they derive revenue from their business activity in Washington. Defendants have purposefully interjected themselves into Washington.

*7 Second, Defendants argue that the burden of

proceeding with this litigation in Washington is substantial. The Court disagrees. It is unsurprising that a nonresident defendant would prefer to litigate an action in the state in which its principal place of business is located. However, such a preference-coupled with the assertion of a lesser burden on Plaintiffs to litigate here (see Defs.' Mot. 14)-is insufficient to establish the existence of a substantial burden on Defendants if they must litigate in Washington. The fact that Defendants apparently will want to call witnesses for this action who currently reside in California, New York, and Texas (see *id.*) also fails to demonstrate a substantial burden of litigating in Washington, as this inconvenience would necessarily apply in any state in which this action ultimately proceeds. Finally, "with the advances in transportation and telecommunications and the increasing interstate practice of law, any burden is substantially less than in days past." *CE Distrib. LLC v. New Sensor Corp.*, 380 F.3d 1107, 1112 (9th Cir.2004). Notwithstanding the fact that most or all of Defendants' witnesses may reside out of state, Defendants have provided evidence of no other circumstances that would indicate that litigating an action in Washington will present a substantial burden or a deprivation of due process. See *Yahoo! Inc.*, 379 F.3d at 1136 ("[W]hile the defendant's burden in litigating in the forum is considered, it will not be deemed unreasonable unless it constitutes a deprivation of due process.") (citing *Core-Vent Corp.*, 11 F.3d at 1488).

Third, and finally, Defendants argue that the efficiency of the forum also weighs against a finding of reasonableness. Defendants largely re-present the same argument they have made regarding the substantial burden of litigating in Washington. However, as with Defendants' substantial burden argument, because Defendants still must secure their California, New York, and Texas witnesses to attend a trial in the alternative forums of either Kansas or Missouri, the added efficiency of litigating this action outside of Washington would be marginal, if not nonexistent.

Defendants do not address any of the remaining reasonableness factors. Even considering these factors, the majority weigh in favor of asserting personal jurisdiction. Litigating this action in Washington is, without question, highly convenient for Plaintiffs, because this is where they chose to initiate the lawsuit. Furthermore, nothing in the record indicates that litigation of this matter in Washington would create sovereignty conflicts with either Missouri or Kansas. Moreover, Washington

Slip Copy
Slip Copy, 2006 WL 1495770 (W.D.Wash.)
(Cite as: Slip Copy)

Page 7

has a substantial interest in adjudicating a dispute involving the sending of thousands of unsolicited e-mails to one (or many) of its residents in violation of Washington law. Accordingly, because a majority of the reasonableness factors favor the assertion of personal jurisdiction, the Court finds that Defendants have failed to present a compelling case that the exercise of personal jurisdiction would be unreasonable in the present case.

*8 Finally, it is apparent from the briefs that there exist a number of factual disputes in the present case that may prove dispositive later in the litigation. For example, the precise manner in which Plaintiff Gordon initially "opted-in" with Virtumundo or Adknowledge is disputed.^{FN9} In addition, the parties dispute whether Gordon's attempt to put Defendants on notice that he did not wish to receive unsolicited e-mail was sufficient under the statutory language of the Federal Can-Spam Act. Although resolution of these factual disputes undoubtedly will have a significant impact on which parties ultimately succeed on the merits, the fact that such disputes exist has no bearing on the jurisdictional issue presently before the Court: whether Defendants have established sufficient contacts with Washington. Accordingly, for purposes of this Rule 12(b)(2) motion, the Court does not need to resolve these factual arguments.

FN9. Gordon claims that he had no prior relationship with Defendants at the time he received the initial unsolicited e-mail (Pls.' Opp'n, Gordon Decl. ¶ 4), whereas Defendants claim that Plaintiff Gordon has misrepresented the fact that he did not opt-in with Virtumundo or Adknowledge.

III. CONCLUSION

For the reasons set forth in this Order, Defendants' motion to dismiss for lack of personal jurisdiction is DENIED.

SO ORDERED.

W.D.Wash.,2006.
Gordon v. Virtumundo, Inc.
Slip Copy, 2006 WL 1495770 (W.D.Wash.)

Briefs and Other Related Documents ([Back to top](#))

- [2006 WL 1501155](#) (Trial Motion, Memorandum and Affidavit) Reply in Support of Defendants'

Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to Fed. R. Civ. P. 12(b)(2) (Apr. 7, 2006) Original Image of this Document (PDF)

- [2006 WL 1501154](#) (Trial Pleading) "First Amended" Complaint for Damages Under the Can-Spam Act of 2003 ¶15 U.S.C. §7701, et seq.; Washington Consumer Protection Act (RCW 19.86); The Washington Commercial Electronic Mail Act (RCW 19.190); RCW 19.170 et seq., and Injunctive Relief (Apr. 3, 2006) Original Image of this Document (PDF)
- [2006 WL 1176845](#) (Trial Motion, Memorandum and Affidavit) Defendants' Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to Fed. R. Civ. P. 12(b)(2) (Mar. 16, 2006) Original Image of this Document (PDF)
- [2006 WL 1501153](#) (Trial Motion, Memorandum and Affidavit) Plaintiff's Response in Opposition to Defendants' Motion to Dismiss (2006) Original Image of this Document (PDF)

END OF DOCUMENT

93

Exhibit C

About the Wayback Machine

Browse through 55 billion web pages archived from 1996 to a few months ago. To start surfing the Wayback, type in the web address of a site or page where you would like to start, and press enter. Then select from the archived dates available. The resulting pages point to other archived pages at as close a date as possible. Keyword searching is not currently supported.

<http://archive.bibalex.org>, the Internet archive at the New Library of Alexandria, Egypt, mirrors the Wayback Machine. Try your search there when you have trouble connecting to the Wayback servers.

Wayback Machine Hardware

Web Collaborations with the Smithsonian and the Library of Congress

Terms, Privacy, Copyright

Contact Us

Frequent Asked Questions

Contributors

Aaron Parkening
 Aaron Stewart
 Abigail Thorne-Lyman
 Adam Tuttle
 Adrian Scott
 Adrian Blakey
 Adrienne Hurndell
 Alan Rath
 Alan Wen
 Alexis Rossi
 Alicia Coryell
 Alzbeta Smith
 Amber Shipley
 Amy Vecchione
 Andy Jenks
 Andie Jewell

The Wayback Machine

INTERNET ARCHIVE

<http://>[Take Me Back](#)[Advanced Search](#)

Archive That!

Don't see your site in the Wayback Machine? Submit an URL for inclusion.

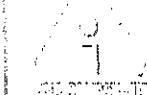
We will archive the site you have submitted and you will be able to view it in the wayback machine within 6 months.

Please note: sites that are database driven, generate dynamic web pages or have robots.txt exclusions can not be archived.

You must be a registered user to submit a site to Archive That. Please [login](#) or [register](#) as a new user.

New Web Archive On Demand Service

ARCHIVE-IT. EXPERTLY CAPTURE YOUR WEBSITE AND MAKE IT EASY TO NAVIGATE, SEARCH AND PRESERVE YOUR CONTENT.



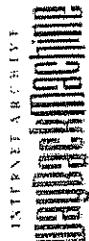
Internet Archive announces the latest release of Archive-It 2.0, a subscription-based archiving service geared towards a broad range of institutions at a cost considerably lower than other archive platforms. Archive-It enables subscribers to capture, categorize, and preserve online material from their own institutions' as well as from the world wide web. Users are able to explore and access these text-searchable collection, without needing additional technical expertise.

Current partners include the Library of Virginia, University of Toronto, Indiana University and North Carolina State Archives, alongside other respected academic and memory institutions.

New Archive-It features include enhancements to the user interface, improved access to collections, advanced search and reporting capabilities.

[Contact the Archive-It team for more details about subscribing.](#)

AS



Enter Web Address: http://

Searched for <http://www.GORDONWORKS.COM>

Note some duplicates are not shown. See all.
* denotes when site was updated.

Search Results for Jan 01, 1996 - Aug 30, 2006

1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
0 pages	0 pages	3 pages	5 pages	14 pages	14 pages	27 pages	34 pages	13 pages	0 pages	
May 08, 1999 *	Aug 15, 2000 *	Jan 12, 2001	Feb 06, 2002	Jan 25, 2003	Jan 09, 2004	Feb 01, 2005 *				
Oct 08, 1999 *	Sep 01, 2000	Feb 02, 2001	May 28, 2002 *	Feb 03, 2003	Jan 14, 2004	Feb 04, 2005 *				
Nov 04, 1999 *	Nov 09, 2000 *	Feb 03, 2001	Jun 02, 2002	Feb 05, 2003	Jan 26, 2004	Feb 07, 2005				
	Nov 21, 2000	Feb 04, 2001	Jun 05, 2002	Feb 12, 2003	Feb 03, 2004	Feb 09, 2005				
	Dec 05, 2000 *	Mar 01, 2001 *	Jul 26, 2002	Feb 16, 2003	Mar 22, 2004 *	Feb 11, 2005				
		Mar 02, 2001	Aug 02, 2002	Mar 22, 2003	Mar 27, 2004 *	Feb 12, 2005				
		Apr 01, 2001 *	Aug 04, 2002	Apr 02, 2003	Apr 03, 2004	Mar 04, 2005 *				
		Apr 05, 2001	Sep 15, 2002	Apr 06, 2003	Apr 14, 2004	Mar 05, 2005				
		Apr 10, 2001	Sep 22, 2002	Apr 24, 2003	Apr 15, 2004	Mar 07, 2005 *				
		Apr 19, 2001 *	Sep 24, 2002	May 24, 2003	May 08, 2004 *	Mar 10, 2005 *				
		May 15, 2001	Sep 29, 2002	May 30, 2003	May 09, 2004 *	Mar 26, 2005				
		Sep 26, 2001 *	Oct 16, 2002	Jun 03, 2003	May 19, 2004 *	Mar 28, 2005 *				
		Nov 29, 2001	Nov 26, 2002 *	Jun 12, 2003	May 24, 2004 *	Mar 29, 2005 *				
		Dec 20, 2001	Nov 27, 2002	Jun 13, 2003	Jun 11, 2004 *					
				Jun 24, 2003	Jun 15, 2004					
				Jul 24, 2003	Jun 16, 2004					
				Jul 29, 2003	Jun 18, 2004					
					Jun 22, 2004					
					Aug 05, 2003					
					Sep 19, 2003	Jun 23, 2004				
					Oct 07, 2003	Jul 01, 2004				
					Oct 24, 2003	Jul 03, 2004				
					Oct 29, 2003	Jul 07, 2004				
					Nov 18, 2003	Jul 11, 2004				
					Nov 27, 2003	Jul 27, 2004 *				
					Dec 17, 2003	Aug 15, 2004				
					Dec 31, 2003	Sep 21, 2004 *				

96

Sep 23, 2004 *
Oct 09, 2004 *
Oct 13, 2004 *
Oct 22, 2004
Oct 23, 2004
Nov 03, 2004
Nov 13, 2004
Nov 18, 2004

[Home](#) | [Help](#)

[Internet Archive](#) | [Terms of Use](#) | [Privacy Policy](#)

10/10/2006 DECL - 22

97

[Top of Page](#)[Text Version](#)[Job Links](#)[Business Links](#)

Do you want to *confidentially* find job opportunities that match your skills, interests and salary requirements? If so, [click here](#) to try our FREE service. END insertion of banner called: [Search Engines](#)

Goal-Setting Page "Find your dream job/Career Central (button) -- 120 x 90" -->

[Sponsor's Page](#)[AMAZON.COM](#)

[Surf The Net Up To 1000% Faster!](#)

Start a new career. Visit [www.career.com](#)

Know anyone who might enjoy this site?

Please ... Let 'em Know!

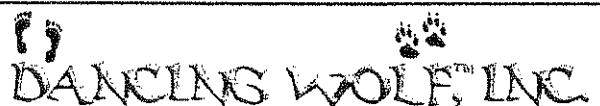
Full Name Email Address

You

Friend

Tell me how to add a referral form to my site.

[Let 'em Know!](#) [Reset](#)

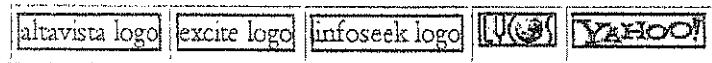


Please visit our sponsor - for your health and nutrition needs

4.9 Cents/Minute Long Distance

TEENGREEN™

Search Engines



Search: All Products	Enter keywords...
Amazon.com logo	
<input type="button" value="Search"/>	

[\[Top of Page\]](#) [\[The Links\]](#)

MOYNIHAN DECL - 23

98

Career Links!!!

Resiliency !!!

As the Webmaster for this site, I have found great joy in doing this site's maintenance. However, there is one drawback for those of us who have Internet web sites. That drawback is providing email links on web pages, which are then "harvested" by spiders and robots of spammers. These spammers then send their unsolicited commercial email messages by the thousands to us.

I created this site in 1996. During the time since its creation, I have had to handle an email burden of up to 2,000 messages each and every day. Changing Internet Service Providers (ISP) several times did not diminish the onslaught of spam.

This site is now hosted by Webmasters.com. Immediately after changing ISPs, I noticed a precipitous drop in the amount of emails that I receive each day. My web host has provided me with the tools to reduce the spam that I receive to less than 100 email messages per day.

On a more personal level, I have taken the extraordinary step of suing spammers that were sending me 5-50 emails per day. Copies of those lawsuits can be found at the links, below.

American Homeowners Assn.
Commonwealth Marketing Group
Theodore Hansson Co.

The time that I have spent handling spam (1000s of hours) has helped me to develop a system that shifts the "financial" burden from me back to those who choose to send me spam. Dealing with the spam problem is the activity, which has taken me away from this site's weekly maintenance and has caused me to postpone adding dozens of new link requests. I will periodically, begin adding these new links and removing the expired ones.

Thank you for taking the time to explore the resources that we link to. We continue to be a free service to our Internet community. We do NOT provide job counseling, resumes or posting. But those resources are linked to this site.

A special thanks to our sponsor for renewing its support of our web site...Dancing Wolf, Inc.

Please bookmark this page, visit us often and tell your friends and family about us.

Best wishes for your employment and career endeavors!

Regards,

Jim Gordon

P.S. Please check out our sister site Small Office Home Office-Business Links.

StopBusiness-WatchdogsStop

Assn. of Certified Fraud Examiners	Better Business Bureau	FTC ConsumerLine	Internet Scambusters
National Consumer Complaint Center	National Fraud Information Center 1(800) 876-7060	Netcheck Commerce Bureau	Netrageous The Public Eye

THE GORDON GROUP claims no affiliation with nor endorsement by any of these agencies or companies.

Tools *TOOLS OF THE TRADE* Tools

This area will feature ready-to-use tools for business, entrepreneurs and job-seekers.
Click on the hammer for **TOOLS**. **Hammer**



The Links, A-M, N-Z!!!

To Report Dead Links

-A-

B C D E F G H I J K L M N O P Q R S T U V W X Y Z

100

1. 1-jobs.com
2. 100 Hot Jobs Web Sites
3. 2001 Colleges, Universities and Scholarships

101 Top College, University and Scholarship Page

4. A & A Resume-Professional Services
5. A Virtual Job Fair...Use Table of Contents Link
6. A Work Day - Canadian Employment Resources
7. A Write Impression - Resume Service
8. AboutWork Welcome Page
9. Academic Employment Network-Job Listings
10. ActiJob - Canada

... ActivEmploy

11. ADGUIDE'S Employment Web Site

College Recruiter Employment Web Site

High School Recruiter Employment Web Site

12. Adsearch- Help Wanted Ads

13. Agency Central

14. AJB Job Search Index

15. All Canadian Jobs

16. All Jobs in the UK

17. Alumni Network

18. America's Employers-The Job-Seekers' Home

19. American Preferred Jobs

20. AmericanJobs.com

21. Apollo Consulting - Sophisticated Career Development...

22. ASAE- Employment List Over 160 Links

23. Asia-Net, Inc---Chinese, Japanese & Korean Bi-linguals...Jobs

24. Ask The Career Wiz

25. Ask The Employer

26. AT & T College Network: Jobs Station

27. Australian Correspondence Schools

-B-

A C D E F G H I J K L M N O P Q R S T U V W X Y Z

28. B2BHRM.com

29. Bakos Group-Career Management Professionals

30. Bay Area Job Board.com

31. Bay Area Jobs

32. Best Jobs USA

33. BigWigs.net

34. Bilingual-Jobs.com

E-cv.com

35. Blue Sun Technical Recruiting

36. Boldface Jobs

37. Bookhaven Press---Career & Business Books\Software

38. Brassring.com

39. Bullseye Job Shop

Computerworld's Center for Professional Development

The Sunday Paper- Online Classifieds

-C-

A B D E F G H I J K L M N O P Q R S T U V W X Y Z

40. Calgary Youth Employment Centre

41. California Career & Employment Center
42. Canadian Executive Recruitment
43. Career Action Center
44. Career and Resume Management for the 21st Century
45. Career Chase
46. Career Choices-Exploring Occupations
47. Career City
48. Career Consulting Corner
49. Career Development Manual

Career Services

Co-operative Education & Career Services

50. Career Expos- High Tech

51. Career Fair Finder

Best Jobs- Careers 96

Career Fairs & Events

Career Fair Calendar-JOBTRAK

Career Fairs Clearinghouse- JOBWEB

Lendman Group- Career Fairs

52. Career Internetworking

53. Career Magazine

54. Career Mosaic

55. Career NFOsource

56. Career Paradise- Colossal Lists of Career Links

57. Career Paths Online

58. Career Planning Process

59. Career Resource Center

60. Career Resource Home Page

61. Career Shop---Applicants

62. Career Site

Candidate Lobby & Sign-in

Employer Lobby & Sign-in

63. The Career Star System

64. Career Success Map

65. Career Talk

145

66. career.com

67. CareerAmerica Job Bank

68. CareerBank.com

69. CAREERBUILDER

70. CareerConnect

71. CareerConnect- Virginia Employment Commission

72. CareerLab

73. CareerMart

74. CareerNET: Career Resources-Associations

75. Career NET

76. CareerPath.com- Classifieds from 19 Major Cities

77. CareerVoyager

78. Careers and Jobs

79. Careers in Government

80. CareersColorado.com

81. Careers Online-Start Here to Explore Your Future

82. CareerWeb-Jobs, Employment and Careers

106

83. Casino Careers Online

84. Chinapoint-China, Asia and Europe Jobs

85. College

College Board Online

College Channel

CollegeNET Home Page

Collegescape Home Page

Internet College Exchange

The Main Quad

86. College Grad Job Hunter

87. College Recruiter Magazine

88. CollegeRecruiter.com

89. Colorado Guide-listings of environmental and outdoor jobs throughout the country and world

90. Colorado Online Job Connection, The

91. Compensation Survey, The SHRM/Mercer

92. Competitive Position Market Analysis for Computer Careers

93. computerwork.com

94. Contract Employment Weekly

95. Cool Works sm

Jobs by State

96. Corporate Gray On-line...Career Transition for Military Personnel

97. Creative Job Search-Ask the Experts

-D-

A B C E F G H I J K L M N O P Q R S T U V W X Y Z

98. DARE Personnel-Australia

99. Definitive Guide to Internet Career Resources---A to Z Links

100. Destinations.ca

101. Developers.Net---Computer Programming & Software Engineering

102. Disability Resources

Americans With Disabilities Act Document Center

» Job Accommodations Network-JAN

» Pre-Employment Screening Considerations and the ADA

Assistive Technology for the Disabled Computer User

Computers for Handicapped Independence Program

Special Education Resources on the Internet

World Information on Disability

103. Do A Project - Referral Service for Contract Employment

-E-

A B C D F G H I J K L M N O P Q R S T U V W X Y Z

104. EAGLEVIEW-Where The Best Jobs Find You

105. Educational Vacancies---U.K.

106. EH&S Employment Services---Environmental Health & Safety

107. Electronic Recruiting News

108. Employers Online

109. Employment Opportunities and Resume Postings

110. Employment Resources

111. Engineer500.com

112. Engineer-Cad.com

113. Engineering Job Source

114. Engineering Jobs

115. EngineerWeb

109

116. Environmental Jobs and Careers

117. Equal Opportunity Publications

118. Executive Recruiters Galleria

119. Experience Inc.

120. Extreme Resume Drop

-F-

A B C D E G H I J K L M N O P Q R S T U V W X Y Z

121. Federal Information Exchange

122. Federal Job Search

123. Federal Jobs Digest

124. Federal Jobs Net

125. FinAid: The Financial Aid Information Page

126. Fincareer.com-The Forum for Professionals in Global Finance

127. Find Your Future @4work.com

128. Findjobs.com

129. Florida Jobs

130. Food and Drink Jobs.com

110

131. Free Scholarship & Financial Aid

2001 Colleges, Colleges, College Scholarships, and Financial Aid Page

132. Free Employment Guide

133. Free Telecommuting Jobs

-G-

A B C D E F H I J K L M N O P Q R S T U V W X Y Z

134. Gary Richards Co. HVAC Technical Employment

135. General Job Posting on the Internet

136. GetJobs.com

137. GO4JOB

138. Goal-Setting Tools & Tips

139. Graduate & Professional Schools

AAMC Academic Medicine Web Site

Career & Graduate Study in Psychology

Graduate Schools Ranking

GRE On-Line

Peterson Education Center

Pre-Law

Yahool - Education:Universities

140. GraduateResumes.com

141. Gradunet- On Line Careers Guide

142. GreatTeacher.net

-H-

A B C D E F G I J K L M N O P Q R S T U V W X Y Z

143. Hard@Work

144. Harvest Personnel-Staffing Services for the 21st Century

145. HeadHunter.NET

146. Health Care Careers & Jobs

147. HealthCareWeb

148. HEART-Career Connection

149. Help Guide to Assist in Job Search

150. Help-Wanted.Net

151. Helpwanted. com---Recruitment On-line, Inc.

Resume- Talent Pool

152. HireAbility

153. HiTechCareer Centre

Career Fair Show Guide

Employer Database

154. Hot Nurse Jobs

-I-

A B C D E F G H J K L M N O P Q R S T U V W X Y Z

155. IEEE Employment Marketplace-Richland, WA

156. iJive.com...Canada Career Site... Find local employers, employment agencies, job banks & career resources that serve Canadians.

157. IndustryLink Homepage

158. InfoTech, Inc.

159. Insurance National Search

160. International Job Centers

161. Internet Career Connection

162. Internet Job Search Aids

-J-

A B C D E F G H I K L M N O P Q R S T U V W X Y Z

163. Job Clincher Resume Services

164. Job Link USA

165. Job Resources by Region

Northeast

Midwest

Southeast

Western

166. Job Options

Salary Calculator Form

167. Job Search for Engineers

168. Job Search Series Brochures

Career Services

169. Job Show

170. Jobs Via Mail

171. JOBACCESS

How to Handle Challenging Interview Questions

172. JobBank USA JobBank USA - specializes in providing career information including job and resume database services to job candidates, employers and recruitment firms in the U.S. and worldwide.

173. JobBoard Surf Shop

174. JobCenter Employment Services (800) 562-2368

175. JobDirect

176. jobEngine---Matchmakers for Computer Industry Professionals

177. JobHunt- All Job Resources

178. JobLynx- 10,000 FREE Links to Jobs

179. JobNext.com

180. JobProfiles.com---The Personal Side of Work...

181. JobQuest Home Page

182. jobs.co.uk - Gateway to all the top job boards in the UK

183. JobSite.com

184. Jobsquare.com

185. Jobs for Engineers

186. Jobs for Programmers-The Web's Top Employment Site for Programmers

187. Jobs for Scientists

188. Jobs in Higher Education

189. Jobs MetaSearch@JobBank USA

190. JobSafari

191. JobServe: The Largest Source of IT Vacancies in the UK

192. Jobsite UK Recruitment Forum

193. JobSmart---General Salary Surveys

JobSmart---Profession-Specific Salary Surveys

Salary Negotiation Strategies

194. JobSource

195. JOBTRAK

196. JobWeb Home Page

197. JobWebs.com

198. Johnson O'Connor Research Foundation-Aptitude Testing

199. Engineering Jobs

-K-

A B C D E F G H I J L M N O P Q R S T U V W X Y Z

200. K's Resume Service at Preferred Jobs

201. Kelly Services Home Page

202. Knowledge Workers' Network

203. KuDeTa- Japan Jobs & Resumes

-L-

A B C D E F G H I J K M N O P Q R S T U V W X Y Z

204. Law Employment Center

205. lawenforcementjob.com

206. LAWMATCH

207. Le Web Cafe-Careers

208. Legalhire.com

209. LibrarySpot

210. Life Career Retreat- Insurance & Financial Services Careers

211. Lucas Careers.com - Executive Recruiters

-M-

A B C D E F G H I J K L N O P Q R S T U V W X Y Z

212. Mad Kane - Workplace Humor

213. Medical JobOptions.com

1 Floyd E. Ivey
2 Liebler, Ivey, Connor, Berry & St. Hilaire
3 1141 N. Edison, Suite C
4 P.O. Box 6125
5 Kennewick, WA 99336
6 Telephone (509) 735-3581
7 Fax (509) 735-3585
8 Attorneys for Defendant
9
10 Mr. Robert J. Siegel
11 1325 4th Ave Ste 940
12 Seattle, WA 98101-2509
13 Telephone (206) 624-9392
14 Fax (206) 624-0717
15 Attorney for Plaintiff

Hon. Fred Van Sickle

10
11 **IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON**

12 JAMES S. GORDON, JR., an individual,

13 } NO. CV-05-5079-FVS

14 Plaintiffs

15 } **NOTICE OF HEARING**

16 vs.

17 } (WITHOUT ORAL
18 ASCENTIVE, LLC
19 a Delaware Limited Liability Company,

20 } ARGUMENT)
21 Defendant } November 10, 2006 @ 6:30 pm

22 PLEASE TAKE NOTICE that Defendant's Motion to Dismiss Plaintiffs'

23 First Amended Complaint will be heard on November 10, 2006 at 6:30 p.m., or as
24 soon thereafter as the Court deems appropriate, without Oral Argument.

25 Dated: October 3, 2006

26 LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE

27 By s/ FLOYD E. IVEY

28 FLOYD E. IVEY, WSBA#6888
Attorneys for Defendant

LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE
Attorneys at Law
P.O. Box 6125
Kennewick, Washington 99336-0125
(509) 735-3581

29 Notice of Hearing - 1.

Z :\ I P C l i e n t \ A s c e n t i v e _ L L C _ v .
Gordon\Pleadings\MotionDismissFirstAmendcomplaint.060927\MotionDismissFi
rstAmended060518\MotionDismissFAC.NOTICE Hearing Dismiss 061002.wpd

118

1 I hereby certify that on October 3, 2006, I electronically filed **Notice of**
2 **Hearing** with the Clerk of the Court using the CM/ECF System which will send
3 notification of such filing to Robert Siegel.

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

S/ FLOYD E. IVEY
FLOYD E. IVEY

LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE

Attorneys at Law

P.O. Box 6125

Kennewick, Washington 99336-0125

(509) 735-3581

Notice of Hearing - 2.

Z:\IPC Client\Ascentive LLC v.
Gordon\Pleadings\MotionDismissFirstAmendcomplaint.060927\MotionDismissFi
rstAmended060518\MotionDismissFAC.NOTICE Hearing Dismiss 061002.wpd

119

214. MedSearch - Healthcare Careers

215. MFGJOBS - Career Information

216. Minnesota Job Bank

217. Minorities' Job Bank

Black Collegian

InterCareer Net- Japan

Resources for Students of Color

Saludos Web

218. MiracleWorkers.com

219. MizBiz.com

220. Mojolin - International Unix & Linux Job Site

221. Mojesco - Network Engineer Job Site

222. My Job Cafe

223. Myboss.com - Job Humor

224. Myjob.com

225. Myjobsearch.com

To Report Dead Links

Other Links

Top of Page	Business Links	TEENGREEN™	Search Engines
-------------	----------------	------------	----------------

In Association with Amazon.com

Jim Gordon

jim@gordonworks.com

Copyright © 1996-2004 Jim Gordon

Created August 1996

Most recent revision February 17, 2004

Microsoft Best When Viewed With



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES S. GORDON, JR., an individual residing in Benton County, Washington,

No. CV-04-5125-FVS

Plaintiff,

ORDER

V.

IMPULSE MARKETING GROUP, INC., a Nevada Corporation,

Defendant.

IMPULSE MARKETING GROUP, INC.,

Third-Party Plaintiff,

V

BONNIE GORDON, JAMES S. GORDON, III,
JONATHAN GORDON, JAMILA GORDON, ROBERT
PRITCHETT and EMILY ABBEY,

Third-Party Defendants.

BEFORE THE COURT is Impulse Marketing's Motion to Compel and Motion for Sanctions (Ct. Rec. 235); Motion to Compel and Request for Sanctions brought by Third-Party Defendants James Gordon, III, (Ct. Rec. 298), Jonathan Gordon (Ct. Rec. 300), Bonnie Gordon (Ct. Rec. 256), Robert Pritchett (Ct. Rec. 259); Amended Motion to Compel and Request for Sanctions brought by Bonnie Gordon (Ct. Rec. 274), and Jamila Gordon (Ct. Rec. 270); Defendant's Motion to Strike portions

ORDER - 1

Exhibit 8

1 of the declarations the Third-Party Defendants submitted in support
2 of their motions. (Ct. Rec. 325).

3 Third-Party Plaintiff Impulse Marketing ("Impulse Marketing") is
4 represented by Floyd Ivey, Sean Moynihan, and Peter Glantz. Third-
5 Party Defendants are proceeding *pro se*.

6 ***Motions to Disqualify Counsel***

7 Although the motions brought by Third-Party Defendants Bonnie
8 and Jamila Gordon are captioned as motions to compel, these motions
9 also request the Court disqualify Impulse Marketing's attorney Floyd
10 Ivey. Bonnie and Jamila Gordon are the wife and daughter,
11 respectively, of the Plaintiff, James Gordon, Jr. Both Bonnie and
12 Jamila Gordon allege Mr. Ivey previously represented the Plaintiff in
13 legal matters and that this previous representation amounts to a
14 conflict of interest. Thus, they contend Mr. Ivey should be
15 disqualified from representing Impulse Marketing because such
16 representation places Mr. Ivey in conflict with the interests of
17 Plaintiff.

18 **1. Standing**

19 Before the Court addresses whether Mr. Ivey's representation of
20 Impulse Marketing presents a conflict of interest, the Court must
21 address the threshold question of standing. Standing is a
22 jurisdictional matter that goes to the power of a federal court to
23 decide an issue placed before it. The standing doctrine "embraces
24 several judicially self-imposed limits on the exercise of federal
25 jurisdiction, such as the general prohibition on a litigant's raising
26 another person's legal rights...." *Allen v. Wright*, 468 U.S. 737,

1 750-51, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). Neither the United
2 States Supreme Court nor the Ninth Circuit has addressed the
3 particular issue of whether the standing doctrine bars a nonclient
4 party from moving to disqualify the opposing party's counsel on the
5 grounds of a conflict of interest. See *FMC Techs., Inc. v. Edwards*,
6 -- F. Supp. 2d --, 2006 WL 624454, *2 (W.D. Wash. 2006). There is a
7 split of authority on this issue. *Id.* (citing *Colyer v. Smith*, 50
8 F.Supp.2d 966, 969 (C.D. Cal. 1999)).

9 In *Colyer*, the district court noted that under the majority view
10 on this issue "only a current or former client of an attorney has
11 standing to complain of that attorney's representation of interests
12 adverse to that current or former client." *Colyer*, 50 F.Supp.2d at
13 969 (citing *In re Yarn Processing Patent Validity Litig.*, 530 F.2d
14 83, 88 (5th Cir. 1976) (stating that "courts do not disqualify an
15 attorney on the grounds of conflict of interest unless the former
16 client moves for disqualification.")). However, the *Colyer* court
17 acknowledged the possibility of nonclient standing where an
18 "unethical change of sides was manifest and glaring" or an ethical
19 violation was "open and obvious," confronting the court with a "plain
20 duty to act." *Colyer*, 50 F.Supp.2d at 969 (citing *Yarn Processing*,
21 530 F.3d at 89). Similarly, the minority view is that a nonclient
22 litigant may bring a motion to disqualify. See *Colyer*, 50 F.Supp.2d
23 at 970-71 (citing *Kevlik v. Goldstein*, 724 F.2d 844 (1st Cir. 1984)).
24 "Like the exception to the majority view, the minority view relies in
25 part on the 'court's well recognized power to control the conduct of
26 the attorneys practicing before it.'" *FMC Techs., Inc.*, 2006 WL

1 624454, *2 (citing *Colyer*, 50 F.Supp.2d at 970).

2 In addressing the standing question, the *Colyer* court held that
3 a nonclient litigant "must establish a personal stake in the motion
4 to disqualify sufficient to satisfy the irreducible constitutional
5 minimum of Article III." *FMC Techs., Inc.*, 2006 WL 624454, *3
6 (citing *Colyer*, 50 F.Supp.2d at 971). Further, the *Colyer* court
7 noted that "where an ethical breach so infects the litigation in
8 which disqualification is sought that it impacts the moving party's
9 interest in a just and lawful determination of her claims, she may
10 have the constitutional standing needed to bring a motion to
11 disqualify based on a third-party conflict of interest or other
12 ethical violation." *FMC Techs., Inc.*, 2006 WL 624454, *3. Like the
13 court in *Colyer*, the district court in *FMC Technologies, Inc.* adopted
14 the rule that "nonclient litigants may, under proper circumstances,
15 bring motions to disqualify counsel based on conflicts of interest."
16 2006 WL 624454, *3.

17 Although the Ninth Circuit has not decided the issue before the
18 Court, the question was presented in *Kasza v. Browner*, 133 F.3d 1159
19 (9th Cir. 1998). In *Kasza*, the court noted that as "a general rule,
20 courts do not disqualify an attorney on the grounds of conflict of
21 interest unless the former client moves for disqualification."
22 *Kasza*, 133 F.3d at 1171 (quoting *United States v. Rogers*, 9 F.3d
23 1025, 1031 (2d Cir. 1983) (quoting in turn *In re Yarn Processing*
24 *Patent Validity Litig.*, 530 F.2d 83, 88 (5th Cir. 1976))). However,
25 the *Kasza* court did not decide the issue because it held there was no
26 basis for disqualification even if the court assumed the plaintiff

ORDER - 4

125

1 had standing. 133 F.3d at 1171.

2 In the present case, without making a final determination on
3 whether it should adopt the majority or minority view, the Court is
4 mindful of the outcome under each view. If the Court adopts the
5 majority view, Third-Party Defendants Bonnie and Jamila Gordon do not
6 have standing to move to disqualify Mr. Ivey. If the Court adopts
7 the minority view, Bonnie and Jamila Gordon, under the proper
8 circumstances, have standing to bring a motion to disqualify Mr. Ivey
9 based on an alleged conflict of interest between Plaintiff and Mr.
10 Ivey. Under the minority view, Bonnie and Jamila Gordon must show
11 "the ethical conflict at issue here sufficiently impacts the 'just
12 and lawful determination' of their claims and that the conflict
13 involved is so intertwined with the current litigation that this
14 Court must consider [the] motion to disqualify[.]" *FMC Techs., Inc.*,
15 2006 WL 624454, *3. Assuming, without deciding, that Bonnie and
16 Jamila have standing to bring this motion to disqualify, the Court
17 proceeds to review the merits of the motion.

18 **2. Disqualification of Floyd Ivey**

19 When faced with an allegation that an attorney's representation
20 presents a conflict of interest, it is "the duty of the district
21 court to examine the charge, since it is that court which is
22 authorized to supervise the conduct of the members of its bar." *Gas-*
23 *A-Tron of Ariz. v. Union Oil Co. of Calif.*, 534 F.2d 1322, 1324 (9th
24 Cir. 1976). The Local Rules for the Eastern District of Washington
25 do not specifically adopt the provisions of the Washington Rules of
26 Professional Conduct as ethical rules governing the practice of

1 lawyers before the courts in this district. However, the Local Rules
2 grant the Court authority to discipline any attorney who violates the
3 Washington Rules of Professional Conduct.¹ Thus, the Washington
4 Rules of Professional Conduct shall govern the Court's
5 disqualification analysis.

6 Here, Bonnie Gordon alleges Mr. Ivey participated in numerous
7 conversations with the Plaintiff regarding spamming, including
8 conversation related to Impulse Marketing. Further, she points to
9 several emails in which Mr. Ivey and the Plaintiff communicated about
10 the possibility of Mr. Ivey assisting the Plaintiff in filing
11 lawsuits for violations of Washington's anti-spam statute. Mr. Ivey
12 acknowledges he provided legal services to the Plaintiff in the past,
13 but contends those services were unrelated to the pending litigation.
14 With respect to the current litigation, Mr. Ivey contends his
15 communication with the Plaintiff included an exchange of general
16 statements, but there was never any formal representation.

17 These allegations implicate Rule 1.9 of the Rules of
18 Professional Conduct, which states:

19 A lawyer who has formerly represented a client in a
20 matter shall not thereafter:

21 (a) Represent another person in the same or a
22 substantially related matter in which that person's
23 interests are materially adverse to the interests of the
24 former client unless the former client consents in writing
25 after consultation and a full disclosure of the material
26 facts; or

24
25 ¹ See LR 83.3 ("This Court may impose discipline on any
26 attorney practicing before this Court, ... who engages in conduct
violating applicable Rules of Professional Conduct of the
Washington State Bar, or who fails to comply with the rules or
orders of this Court.").

(b) Use confidences or secrets relating to the representation to the disadvantage of the former client, except as rule 1.6 would permit.

Wash. Rules of Prof'l Conduct R. 1.9 (2005). Under Rule 1.9(a), the significant elements include (1) whether the conflict involves a former client; (2) whether the subsequent representation is materially adverse to the former client; and (3) whether the matters are substantially related. *Id*; see also *Trone v. Smith*, 621 F.2d 994, 998 (9th Cir. 1980).

Here, it is clear Plaintiff has not consented to Mr. Ivey's representation of Impulse Marketing, but it is not clear whether Plaintiff was ever a "former client" of Mr. Ivey. Assuming, without deciding, that Plaintiff was a former client of Mr. Ivey, Bonnie and Jamila Gordon must also show the matters currently at issue are substantially related to the subject matter of the former representation. *Sanders v. Woods*, 121 Wash.App. 593, 597-98, 89 P.3d 312 (Div. 3, 2004); *Trone*, 621 F.2d at 996 ("The relevant test for disqualification is whether the former representation is "substantially related" to the current representation.") The determination of whether the two representations are substantially related turns on whether the lawyer was so involved in the former representation that he can be said to have switched sides. *Sanders*, 121 Wash.App. at 598, 89 P.3d 312.

Here, the facts of the case reveal that on September 22, 2003, Plaintiff sent Mr. Ivey an unsolicited email in which Plaintiff outlined the procedural steps he had taken to reduce the spam he had been receiving. Plaintiff also explained in this email that he had

ORDER = 7

125

1 drafted a complaint and was "seeking an attorney to 'perfect' [his]
2 complaint so that [he could] file it in District Court." (Ct. Rec.
3 283-2, at 52.). In the alternative, Plaintiff stated he "may want to
4 hire an attorney to represent [him] in court." *Id.* (emphasis added).
5 In response, Mr. Ivey said he was interested but encouraged Plaintiff
6 to contact the Attorney General. *Id.* In response, Plaintiff
7 forwarded Mr. Ivey a copy of an email Plaintiff previously sent to
8 the Attorney General. In the email to the Attorney General,
9 Plaintiff explained he had received over 12,000 unsolicited
10 commercial email (spam) in the past month, that he had successfully
11 identified the origin of some of those emails, and that he had sent
12 demand letters to the senders, citing the Washington anti-spam
13 statute. Plaintiff suggested to the Attorney General that the State
14 of Washington "turn this proverbial lemon into lemonade--making spam
15 a "profit center" for the State of Washington as well as other
16 organizations within the State." (Ct. Rec. 283-2, at 56).

17 On September 25, 2003, Plaintiff sent another email to Mr. Ivey.
18 (Ct. Rec. 283-2, at 57). Plaintiff explained that the amount of spam
19 he was receiving was becoming an imposition on his business and on
20 his personal use of the internet and that he believed Washington's
21 anti-spam statute was designed to prevent the "abuse" he was
22 experiencing. *Id.* Plaintiff closed his email by thanking Mr. Ivey
23 for considering the issues. *Id.* at 58. Mr. Ivey responded by
24 stating that his attorney services would cost \$225 per hour and that
25 he could not guarantee a solution. Mr. Ivey closed his email by
stating there would be a "real budget needed ... to commence the

1 effort. Please advise if you want to examine the prospect of going
2 forward." *Id.* at 57.

3 On September 30, 2003, Plaintiff sent another email to Mr. Ivey,
4 in which Plaintiff explained that he had email documentation showing
5 the violations he alleged and had drafted two complaints. (Ct. Rec.
6 295-1, at 15). Plaintiff asked Mr. Ivey how he would like to proceed
7 and requested Mr. Ivey identify the proposed costs. *Id.* Plaintiff's
8 next email is dated December 30, 2003. (Ct. Rec. 295-1, at 17).
9 From the context of that email, it appears Plaintiff chose to proceed
10 *pro se* and filed the complaints in superior court against two
11 companies. In the email, Plaintiff told Mr. Ivey that a superior
12 court had granted Plaintiff's request for temporary restraining
13 orders against these two companies. *Id.* Plaintiff asked Mr. Ivey if
14 he was still interested and in what way he envisioned assisting the
15 Plaintiff. *Id.* Beyond these emails, the record does not reveal any
16 other contact between Mr. Ivey and Plaintiff.

17 After reviewing these emails, the Court concludes Mr. Ivey's
18 representation of Impulse Marketing is not substantially related to
19 any previous representation of Plaintiff. The emails reveal Mr. Ivey
20 never offered any formal legal advice and never reviewed any legal
21 pleadings for Plaintiff. Further, it appears Plaintiff declined to
22 examine the prospect of hiring Mr. Ivey and chose instead to proceed
23 *pro se* with his anti-spam case. In determining whether a conflict of
24 interest exists, the "underlying concern is the possibility, or the
25 appearance of the possibility, that the attorney may have received
26 confidential information during the prior representation that would

1 be relevant to the subsequent matter in which disqualification is
2 sought." *Sanders*, 121 Wash.App. at 599, 89 P.3d 312. Here, the
3 emails produced by Mr. Ivey show no confidential information was
4 disclosed. Further, Bonnie and Jamila Gordon have not presented any
5 evidence providing even the appearance of the possibility that
6 confidential information was disclosed. For these reasons, the Court
7 determines Mr. Ivey's representation of Impulse Marketing does not
8 present a conflict of interest. Therefore, Bonnie and Jamila
9 Gordon's motions to disqualify Floyd Ivey are denied.

10 ***Impulse Marketing's "Second" Motion to Compel***

11 On April 18, 2006, Impulse Marketing re-noted for hearing its
12 "First Motion to Compel." The Court previously denied this motion to
13 compel, directing the parties to meet and confer in an attempt to
14 resolve their discovery problems. It is not clear from the record
15 whether the parties did in fact "meet and confer" but Impulse
16 Marketing continues to argue Plaintiff is not providing adequate
17 responses to Defendant's discovery requests. Plaintiff objects to
18 the motion to compel, arguing the alleged "deficiencies" in
19 Plaintiff's responses are actually Impulse Marketing's "improper
20 demands." The Court determines it is appropriate and necessary to
21 refer the parties' discovery dispute to a discovery master.
22 Therefore, Impulse Marketing's motion to compel is denied and an
23 Order referring this matter to a discovery master will be
24 forthcoming.

25 ***Third-Party Defendants' Motions to Compel and for Sanctions***

26 Third-Party Defendants each allege Impulse Marketing failed to

ORDER - 10

1 make the "required Rule 26 disclosures" and "provided evasive,
2 incomplete disclosure, answer, or response to discovery propounded
3 by" [sic] Third-Party Defendants. In support of their motions to
4 compel, Third-Party Defendants provided copies of some of their
5 interrogatories and Impulse Marketing's answers. In response to many
6 of Third-Party Defendants' interrogatories, Impulse Marketing
7 asserted the standard ambiguous, irrelevant and overbreadth
8 objections. Because Third-Party Defendants failed to cite any legal
9 authority or provide any legal analysis in response to Impulse
10 Marketing's objections to the propounded discovery requests, it is
11 difficult for the Court to analyze and resolve the discovery dispute.
12 Thus, the Court determines it is necessary to refer the parties'
13 discovery dispute to a discovery master. Therefore, Third-Party
14 Defendants' motions to compel are denied and an order referring this
15 matter to a discovery master will be forthcoming. Accordingly,

16 **IT IS HEREBY ORDERED:**

17 1. Impulse Marketing's Motion to Compel and Motion for
18 Sanctions (Ct. Rec. 235) is **DENIED**.

19 2. Motions to Compel and Request for Sanctions brought by
20 Third-Party Defendants James Gordon, III, (Ct. Rec. 298), Jonathan
21 Gordon (Ct. Rec. 300), Bonnie Gordon (Ct. Rec. 256), Robert Pritchett
22 (Ct. Rec. 259) are **DENIED**.

23 3. Amended Motions to Compel and Request for Sanctions brought
24 by Bonnie Gordon (Ct. Rec. 274) and Jamila Gordon (Ct. Rec. 270) are
25 **DENIED**; Bonnie and Jamila Gordon's request to disqualify Floyd Ivey
26 are denied.

ORDER - 11

132

- 1 4. Defendant's Motion to Strike (Ct. Rec. 325) is MOOT.
- 2 5. Bonnie Gordon's Motion to Expedite (Ct. Rec. 337) is MOOT.
- 3 6. Bonnie Gordon's Motion to Strike (Ct. Rec. 339) is MOOT.
- 4 7. Jamila Gordon's Motion to Expedite (Ct. Rec. 342) is MOOT.
- 5 8. Jamila Gordon's Motion to Strike (Ct. Rec. 344) is MOOT.

6 **IT IS SO ORDERED.** The District Court Executive is hereby
7 directed to enter this Order and furnish copies to counsel **AND to the**
8 **Third-Party Defendants who are proceeding *pro se*.**

9 **DATED** this 15th day of May, 2006.

10 s/ Fred Van Sickle
11 Fred Van Sickle
12 United States District Judge

21 ORDER - 12

133

1

2

3

4

5

6

7

8

OMNI INNOVATIONS, LLC, a
Washington Limited Liability
company; EMILY ABBEY, an
individual,

NO. 06-01284

9

FIRST AMENDED COMPLAINT

10

Plaintiffs,

11

v.

12

ASCENTIVE, LLC, a Delaware
limited liability company; ADAM
SCHRAN, individually and as part of
his marital community; JOHN DOES,
I-X,

Defendants,

PARTIES, JURISDICTION, VENUE

13

1. Plaintiff OMNI INNOVATIONS, LLC, (hereinafter "OMNI") is a Washington
limited liability company duly licensed and registered with the State of Washington,
with its principal place of business in Franklin County, Washington.
2. Plaintiff EMILY ABBEY, (hereinafter "ABBEY") is an individual residing in King
County, Washington.
3. On information and belief, plaintiff alleges that Defendant ASCENTIVE, LLC,
("ASCENTIVE") is a limited liability company registered in Delaware, with its
principal place of business located in Philadelphia, Pennsylvania.

24

25

COMPLAINT FOR DAMAGES, PENALTIES, ETC. -1

MERKLE SIEGEL & FRIEDRICHSEN

1325 Fourth Ave., Suite 940

Seattle, WA 98101

Phone: 206-624-9392

Fax: 206-624-0717

134

Exhibit 9

- 1 4. On information and belief, ADAM SCHRAN, ("Schran") is an officer, director,
2 and/or majority shareholder of Ascentive, and as such controls its policies, activities,
3 and practices, including those alleged herein on behalf of those defendants. All acts
4 and practices undertaken by Schran on behalf of Ascentive are and were for the
5 benefit of his marital community. SCHRAN resides in the State of Pennsylvania and
6 transacts or has transacted business in the State of Washington and in the Western
7 District of Washington.
- 8 5. Jurisdiction is proper pursuant to 28 U.S.C. §1331 (federal question) and 28 U.S.C.
9 §1332 (diversity).
- 10 6. This Court has supplemental jurisdiction of state law claims pursuant to U.S.C. §
11 1367.
- 12 7. Venue is proper pursuant to 28 U.S.C. §1391.
- 13 8. From and after May 2005, Plaintiff OMNI provided and enabled computer access for
14 multiple users to a computer server that provides access to the Internet.
- 15 9. The domain names served by Plaintiff OMNI include: anthonycentral.com,
16 chiefmusician.net, ehahomie.com, itdidnotendright.com, jammomm.com,
17 jaycelia.com, celiajay.com, jaykaysplace.com, rcw19190020.com, and
18 gordonworks.com (collectively the "Domains" and individually and generically a
19 "Domain").
- 20 10. At all times material hereto, for the Domains and each of them, the information that
21 all e-mail addresses at each Domain (the "Recipient Addresses") belong to
22 Washington residents was and is available upon request from the registrant of each
23 Domain, each registrant being a Washington resident and each Domain being
24 registered with a Washington address.
- 25 11. During the time period of approximately August 2003 through May 2006, Plaintiff
26 received at the Domains electronic-mail messages (collectively the "E-mails" or
27 individually and generically as an "Email").

12. The E-mails, and each of them, were received by Plaintiff OMNI's servers serving
13. the Domains, or at the Domains themselves, and/or on individual Plaintiffs' email
14. accounts, and on their computers.
15. Each of the E-mails misrepresents or obscures information in identifying the point of
16. origin or the transmission path thereof, and contains header information that is
17. materially false or materially misleading. The misrepresentations include without
18. limitation: IP address and host name information do not match, or are missing or
19. false, in the "from" and "by" tokens in the Received header field; and dates and times
20. of transmission are deleted or obscured.
21. 14. On information and belief, Plaintiff alleges that some of the E-mails used the Internet
22. domain name of a third party or third parties without permission of that third party or
23. those third parties, and/or used false, or misleading information in registering the
24. domains used to send the subject E-mails.
25. 15. Defendant initiated the transmission of the E-mails, and each of them. In the
26. alternative, Defendant conspired or otherwise acted in collusion with another or
27. others or assisted another or others to transmit the E-mails, and each of them.
28. 16. At all times material hereto, Defendants knew or had reason to know that the
29. Recipient Addresses, and each of them, were and are held by a Washington resident.

30. FIRST CAUSE OF ACTION – CAN-SPAM ACT

31. 15 U.S.C. §7701 et seq.

32. 17. On the basis of the facts set forth hereinabove, Defendants initiated the transmission
33. of the E-mails, and each of them, to a protected computer in violation of 15 U.S.C.
34. §7704(a), causing damage to Plaintiff as the provider of the Internet access service
35. receiving each such E-mail in the amount of \$100 for each such E-mail, as provided
36. in 15 U.S.C. §7706 (g) (3).

- 1 18. Defendants did willfully and knowingly so act in violation of the provisions of 15
2 U.S.C. §7701 et seq., and Defendant's acts did cause Plaintiffs to suffer injury and
3 damages.
4

5 **SECOND CAUSE OF ACTION – CEMA**

6 **RCW 19.190.010 - .070**

- 7 19. On the basis of the facts set forth hereinabove, Defendants initiated, conspired with
8 another to initiate, or assisted the transmission of the E-mails, and each of them, in
9 violation of RCW 19.190.020, causing damage to Plaintiff as the interactive computer
service receiving each such E-mail in the amount of \$1,000 for each such E-mail, as
provided in RCW 19.190.040 (2).
10

11 **THIRD CAUSE OF ACTION – CONSUMER PROTECTION ACT**

12 **Ch. 19.86 RCW**

- 13 20. On the basis of the facts set forth hereinabove, Defendants initiated the E-mails, and
14 each of them, in violation of RCW 19.190.030 and Chapter 19.86 RCW, causing
15 damage to Plaintiff as the interactive computer service receiving each such E-mail.
16 Defendant's acts constitute unfair and deceptive practices in the course of trade and
17 commerce, which acts caused injury to Plaintiffs, and which acts therefore violate
18 RCW 19.86.
19

20 **REQUEST FOR RELIEF**

21 Plaintiff respectfully requests the following relief:
22

- 23 1. Entry of a Judgment in favor of Plaintiff against the Defendants in the amount of \$1,100
per unlawful E-mail, plus such other and further damages as may be proved at trial, plus
24 treble damages to the extent permitted by Chapter 19.86 RCW and to the extent permitted
25

COMPLAINT FOR DAMAGES, PENALTIES, ETC. -4

MERKLE SIEGEL & FRIEDRICHSEN

1325 Fourth Ave., Suite 940

Seattle, WA 98101

Phone: 206-624-9392

Fax: 206-624-0717

1 by 15 U.S.C. §7706 (g) (3) (C), plus prejudgment and post-judgment interest at the
2 highest rate permitted by law, plus cost of suit and reasonable attorney fees pursuant to
3 Chapter 19.86 RCW and 15 U.S.C. §7706 (g) (4);

- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
2. Entry of a permanent injunction against the Defendants prohibiting the Defendants from sending or causing to be sent electronic mail messages of any kind or nature to e-mail addresses at the Domains, hereinabove.
 3. Such other and further relief as the Court deems just and equitable in the premises.

RESPECTFULLY SUBMITTED this 19th day of September, 2006.

MERKLE SIEGEL & FRIEDRICHSEN, P.C.

DOUGLAS E. MCKINLEY, JR

Attorney at Law

/S/ Robert J. Siegel

/S/ Douglas E. McKinley, Jr.

Robert J. Siegel, WSBA #17312

Douglas E. McKinley, Jr., WSBA #20806

Attorney for Plaintiffs

Attorney for Plaintiffs

COMPLAINT FOR DAMAGES, PENALTIES, ETC. -5

MERKLE SIEGEL & FRIEDRICHSEN

1325 Fourth Ave., Suite 940

Seattle, WA 98101

Phone: 206-624-9392

Fax: 206-624-0717

138

1 MERKLE SIEGEL & FRIEDRICHSEN, P.C.
2 Robert J. Siegel
3 1325 Fourth Ave., Suite 940
4 Seattle, WA 98101
5 (206) 624-9392

6
7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF WASHINGTON, RICHLAND

9 JAMES S. GORDON, Jr., a married
10 individual, d/b/a
11 'GORDONWORKS.COM',

12 Plaintiffs,

13 v.
14 ASCENTIVE, LLC, a Delaware
15 limited liability company; ADAM
16 SCHRAN, individually and as part of
17 his marital community;
18 JOHN DOES, I-X,

19 Defendants.

20 NO. CV-05-5079-FVS

21 [FIRST AMENDED]
22 COMPLAINT FOR DAMAGES
23 UNDER THE CAN-SPAM ACT OF
24 2003 [15 U.S.C. §7701, *et seq.*] ;
25 WASHINGTON CONSUMER
PROTECTION ACT (RCW 19.86);
THE WASHINGTON
COMMERCIAL ELECTRONIC
MAIL ACT (RCW 19.190 *et seq.*);
RCW 19.170 *et seq.*, and Injunctive
Relief

26 [JURY DEMANDED]

27 COMES NOW, Plaintiff James S. Gordon, Jr. and brings this First Amended COMPLAINT
28 against defendants named herein. Plaintiffs allege the following on information and belief:

29 1. PARTIES

30 1.1 Plaintiff James S. Gordon, Jr. ("Gordon") is a married individual who is and was
31 a resident of Benton and/or Franklin County, Washington, and who was doing business
32 as an interactive computer service as 'gordonworks.com', during the time of all acts
33 complained of herein.

34
35 FIRST AMENDED COMPLAINT FOR DAMAGES,
36 PENALTIES, ETC. -1
37 GORDON v. ASCENTIVE, LLC, ET AL.

38 MERKLE SIEGEL & FRIEDRICHSEN
39 1325 Fourth Ave., Suite 940
40 Seattle, WA 98101
41 Phone: 206-624-9392
42 Fax: 206-624-0717

139

B. Siegel 10

- 1 1.2 Defendant Ascentive, LLC ("Ascentive") upon information and belief, is a
2 Delaware limited liability company, with its principle place of business located in
3 Philadelphia, Pennsylvania.
- 4 1.3 Defendant Adam Schran ("Schran") is an officer, director, and/or majority
5 shareholder/member of Ascentive, and as such controls its policies, activities, and
6 practices, including those alleged herein on behalf of Ascentive. All acts and practices
7 undertaken by Schran on behalf of Ascentive are and were for the benefit of his marital
8 community. Defendant resides in the State of Pennsylvania and transacts or has
9 transacted business in the State of Washington and in the Eastern District of Washington.
- 10 1.4 The actions alleged herein to have been undertaken by the defendants were
11 undertaken by each defendant individually, were actions of which each defendant had
12 knowledge and that each defendant authorized, controlled, directed, or had the ability to
13 authorize, control or direct, and/or were actions each defendant assisted and/or
14 participated in, and are actions for which each defendant is liable. Each defendant aided,
15 abetted, assisted, and conspired with the actions of each other defendant herein in that
16 each defendant had knowledge of those actions, provided assistance and benefited from
17 those actions, in whole or in part. Each of the defendants was the agent of each of the
18 other defendants, and in committing those acts herein alleged, was acting within the
19 course and scope of such agency and with the permission and consent of other
20 defendants.

II. JURISDICTION

- 21 2.1 This Court has original jurisdiction of the causes of action herein which are
22 brought under the CAN-SPAM Act of 2003 – 15 U.S.C. §7701, *et seq.*, 15 U.S.C.
23 §7707(g)(1).
- 24 2.2 The unlawful actions of the defendants were committed in the States of
25 Washington, Georgia, and in the judicial district of this Court.
- 26 2.3 The Defendants regularly transact business within the State of Washington by
27 virtue of the fact that they regularly send commercial bulk emails into the State, which

140
FIRST AMENDED COMPLAINT FOR DAMAGES,
PENALTIES, ETC. -2
GORDON v. ASCENTIVE, LLC, ET AL.

MERKLE SIEGEL & FRIEDRICHSEN
1325 Fourth Ave., Suite 940
Seattle, WA 98101
Phone: 206-624-9392
Fax: 206-624-0717

1 emails are received on computers and other electronic devices owned and maintained by
2 residents of the State in the State. As a result of the Defendants' acts and transactions
3 within the State of Washington, this Court has personal jurisdiction over the Defendants
4 under RCW 4.28.185(1)(a).

5 2.4 The causes of action complained of herein include allegations that commercial
6 electronic messages sent by or on behalf of the Defendants to the Plaintiffs violate RCW
7 19.190 et seq., the Washington Commercial Electronic Mail Act (CEMA) and RCW
8 19.86 et seq. the Washington State Consumer Protection Act (CPA), and RCW 19.170
9 et seq.

10 2.5 This Court has diversity jurisdiction as plaintiffs and defendants are residents of
11 different states, and the complaint includes a prayer for relief in excess of \$75,000,
12 exclusive of interest and costs.

13 2.6 Jurisdiction to commence this action is conferred by 15 U.S.C. §7701, *et seq.*, 15
14 U.S.C. §7707(g)(1); RCW 19.86.080, 19.86.090, 19.86.160, RCW 19.190.030 and RCW
15 4.12.020-.025.

16

17 III. General Allegations

18 3.1 Plaintiffs reallege and incorporate as though fully set forth herein, all prior
19 paragraphs herein.

20 3.2 Plaintiff Gordon is the registrant of the internet domain "gordonworks.com", and
21 is an interactive computer service as that term is defined in 15 U.S.C. §7703(11); 47 USC
22 231(e)(4); and RCW 19.190.010 (7).

23 3.3 Gordon provides or enables computer access by multiple users to a computer
24 server that hosts the "gordonworks.com" domain name and further provides electronic
25 mail accounts to individuals utilizing their personal domain names for electronic
messaging, including individuals residing within the Federal judicial district in which this
case is brought.

3.4 Plaintiff Gordon is a user of the interactive computer service provided by
‘gordonworks.com’, and maintains electronic mail message accounts with

24
25
FIRST AMENDED COMPLAINT FOR DAMAGES,
PENALTIES, ETC. -3
GORDON v. ASCENTIVE, LLC, ET AL.

MERKLE SIEGEL & FRIEDRICHSEN
1325 Fourth Ave., Suite 940
Seattle, WA 98101
Phone: 206-624-9392
Fax: 206-624-0717

1 'gordonworks.com, including under the address jim@gordonworks.com as well as the
2 domain name "rcw19190020.com".

3.5 At all times relevant to this action, Plaintiff's status as Washington resident is and
3 was public knowledge and available to defendants upon request from the Plaintiff, his
4 domain registrar information, and other readily accessible sources.

5.6 The Defendants have initiated the transmission of numerous commercial email
6 messages directed to and through Plaintiff's interactive computer service, and/or to and
7 through Plaintiff Gordon's domain 'gordonworks.com', and/or further addressed to
8 Plaintiff Gordon's email address jim@gordonworks.com.

9 **IV. Causes of Action**

10 **4.1 First Cause of Action**

11 **Violations of the Can-Spam Act of 2003 [15 U.S.C. §7701 et seq.]**

12 Plaintiff realleges all preceding paragraphs and incorporates them herein as if set forth in full:

13 4.1.1 Plaintiff has received hundreds of commercial electronic mail messages from or
14 on behalf of defendants, sent to his interactive computer service located in Benton and Franklin
15 Counties, Washington, and/or to its registered domains, including 'gordonworks.com' in
16 violation of the CAN-SPAM Act of 2003, 15 U.S.C. §7701 et seq.

17 4.1.2 Plaintiff further alleges that he received numerous items of electronic mail from
18 the defendants sent to his 'gordonworks.com' domain name and servers, and to email addresses
19 served thereby, that were responded to with specific requests not to receive future commercial
20 electronic mail messages, which requests went unheeded for a substantial amount of time during
21 which defendants continued to send unlawful email to plaintiff in violation of 15 U.S.C.
22 §7704(a)(4).

23 4.1.3 Plaintiff further alleges that the defendants sent at least one (1) separate item of
24 electronic mail to the plaintiff to an address most likely harvested from domain name
25

FIRST AMENDED COMPLAINT FOR DAMAGES,
PENALTIES, ETC. -4
GORDON v. ASCENTIVE, LLC, ET AL.

MERKLE SIEGEL & FRIEDRICHSEN
1325 Fourth Ave., Suite 940
Seattle, WA 98101
Phone: 206-624-9392
Fax: 206-624-0717

1462

1 registration and/or by other means of anonymous Internet information harvesting. Said
2 conduct was in violation of 15 U.S.C. §7704(b)(1)(A)(i), and (ii).

3 4.1.4 Plaintiff further alleges that defendants initiated the transmission of commercial
4 electronic mail to plaintiff at and through his 'gordonworks.com' domain, and to individual
5 email accounts at that domain and on its server, which electronic mail included materially
6 misleading subject lines, which constitutes a violation of 15 USC 7704(a)(2).

7 4.1.5 Plaintiff further alleges that defendants initiated the transmission of commercial
8 electronic mail to plaintiff at and through its 'gordonworks.com' domain, and to individual
9 email accounts served thereby, which electronic mail failed to provide a functioning
10 mechanism, clearly and conspicuously displayed, that a recipient may use, in a manner
11 specified in the message, to request not to receive further messages from the sender, which
12 constitutes violations of 15 USC 7704(a)(3)(A), and 7704(a)(4)(A)(ii).

13 4.1.6 Plaintiff further alleges that defendants initiated the transmission of commercial
14 electronic mail to plaintiff at and through its 'gordonworks.com' domain and server to
15 individual email accounts served thereby, which electronic mail failed to provide clear and
16 conspicuous notice that the mail is an "advertisement", which constitutes a violation of 15
17 USC 7704(a)(4)(A)(i).

19 4.1.7 Plaintiff further alleges that defendants initiated the transmission of commercial
20 electronic mail to plaintiff at and through its 'gordonworks.com' domain and server, and to
21 individual email accounts served thereby, which electronic mail constitutes a violation of 15
22 USC 7704(a)(2).

23 4.1.8 Plaintiff further alleges that defendants initiated the transmission of commercial
24 electronic mail to plaintiff at and through its 'gordonworks.com' domain and server, and to
25

1463
FIRST AMENDED COMPLAINT FOR DAMAGES,
PENALTIES, ETC. -5
GORDON v. ASCENTIVE, LLC, ET AL.

MERKLE SIEGEL & FRIEDRICHSEN
1325 Fourth Ave., Suite 940
Seattle, WA 98101
Phone: 206-624-9392
Fax: 206-624-0717

individual email accounts served thereby, which electronic mail failed to include a physical postal address, which constitutes a violation of 15 USC 7704(a)(4)(A)(iii).

4.1.9 As a proximate result of said unlawful conduct by said defendants, Plaintiff is entitled to damages for the actual monetary loss incurred or statutory damages in the amount of up to \$100.00 in the case of violation of Section 5(a)(1) or up to \$25.00 in the case of each violation of the other subsections of Section 5 in the form of statutory damages as set forth in 15 U.S.C. §7707(g)(1) and (3)(A).

4.1.10 Plaintiff furthermore seeks a preliminary and permanent injunction against the defendants for their current and future violations of the CAN-SPAM Act of 2003 as it and members of the general public will continue to incur damages as a result of the unlawful conduct of said defendants. The seeking of injunctive relief by the plaintiff is specifically authorized by 15 U.S.C. §7707(g)(1)(A).

4.1.6 Plaintiff furthermore seeks his attorney fees and costs against the defendants pursuant to 15 U.S.C. §7707(g)(4).

4.2 Second and Third Causes of Action

Violations of the Washington CEMA [RCW 19.190.020 et seq.]

and the Washington Consumer Protection Act [RCW 19.86 et seq.]

Plaintiffs reallege all preceding paragraphs and incorporates them herein as if set forth in full:

4.2.1 It is a violation of RCW 19.190.020(1)(a)(b) and 19.190.030(1)(a)(b) to initiate the transmission, conspire with another to initiate the transmission, or assist the transmission, of a commercial electronic mail message from a computer located in Washington or to an electronic mail address that the sender knows, or has reason to know, is held by a Washington resident that uses a third party's internet domain name without permission of the third party, or otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message, or contains false or misleading information in the subject line.

FIRST AMENDED COMPLAINT FOR DAMAGES,
PENALTIES, ETC. -6
GORDON v. ASCENTIVE, LLC, ET AL.

MERKLE SIEGEL & FRIEDRICHSEN
1325 Fourth Ave., Suite 940
Seattle, WA 98101
Phone: 206-624-8392
Fax: 206-624-0717

1 4.2.2 Defendants initiated the transmission, or assisted and/or conspired to transmit
2 numerous commercial electronic mail messages to Plaintiff Gordon's 'gordonworks.com
3 domain, and to his individual email account which defendants knew, or had reason to know
4 were located in the state of Washington, which emails misrepresented or obscured
5 information identifying the point of origin or the transmission path, and/or which contained
6 false or misleading information in the subject line, which constitutes violations of RCW
7 19.190 et seq.

8 4.2.3 It is further a violation of RCW 19.190.080 to "solicit, request, or take any action
9 to induce a person to provide personally identifying information by means of a web page,
10 electronic mail message, or otherwise using the internet by representing oneself, either
11 directly or by implication, to be another person, without the authority or approval of such
12 other person." Numerous emails sent by Defendants and received by Plaintiff violated this
13 provision of the CEMA.

14 4.2.4 Pursuant to RCW 19.190.020(1)(a)(b), each email sent in this Second Cause of
15 Action is a separate and distinct violation of RCW 19.190, and pursuant to RCW
16 19.190.030(1)(a)(b), (2), and (3) constitutes a separate and distinct violation of the Consumer
17 Protection Act, RCW 19.86.

18 4.2.5 Further, defendants' acts herein alleged, constitute separate and distinct violations
19 of RCW 19.86 as they constitute unfair or deceptive acts and practices, occurring in the
20 regular course of defendants' conduct of trade and commerce, and are unfair methods of
21 competition, which acts have been, or are likely to be perpetrated against other residents of
22 the State. Defendants' acts further violated RCW 9.35 et seq., which the legislature has
23 found are matters vitally affecting the public interest (RCW 9.35.800) for the purpose of
24 applying the Consumer Protection Act, chapter 19.86 RCW. A violation of RCW 9.35.020 is
25 an unfair or deceptive act in trade or commerce and an unfair method of competition for the
 purpose of applying the Consumer Protection Act, chapter 19.86 RCW.

26
27 Plaintiffs have been damaged as a result of Defendants' statutory violations as set forth
28 herein, in an amount to be proven at trial.

29
30 FIRST AMENDED COMPLAINT FOR DAMAGES,
31 PENALTIES, ETC. -7
32 GORDON v. ASCENTIVE, LLC, ET AL.

33
34 MERKLE SIEGEL & FRIEDRICHSEN
35 1325 Fourth Ave., Suite 940
36 Seattle, WA 98101
37 Phone: 206-624-9392
38 Fax: 206-624-0717

445

1

2

3

4.3 Fourth Cause of Action

4

RCW 19.170 et seq.

5

Plaintiff realleges all preceding paragraphs and incorporates them herein as if set forth in full:

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

- 4.3.1 RCW 19.170 et seq. makes it unlawful under Washington State law to deceptively advertise or promote “free” prizes, gifts, awards, travel coupons or certificate, free item, or any other item offered in a promotion that is different and distinct from the goods, service, or property promoted by a sponsor. The statute makes a violation of RCW 19.170 a per se violation of the State Consumer Protection Act (RCW 19.86 et seq.)
- 4.3.2 Numerous email advertisements, i.e., “spam” which Defendants transmitted to Plaintiffs, as described herein, violated RCW 19.170 et seq., in the following ways: In violation of RCW 19.170.030:

- (a) The offending emails contained offers, and promotions for prizes, gifts, and awards which failed to identify the name and address of the promoter and the sponsor of the promotion; and/or,
- (b) failed to state the verifiable retail value of each prize offered in it; and/or,
- (c) failed to disclose the verifiable retail value and odds for each prize which must be stated in immediate proximity on the same page with the first listing of each prize in type at least as large as the typeface used in the standard text of the offer; and/or
- (d) failed to conspicuously disclose, if a person is required or invited to view, hear, or attend a sales presentation in order to claim a prize that has been awarded, may have been awarded, or will be awarded, the requirement or invitation must be conspicuously disclosed under subsection (7) of this section to the person in the offer in bold-face type at least as large as the typeface used in the standard text of the offer; and/or,
- (e) or failed to otherwise comply with RCW 19.170.030 which requires that “No item in an offer may be denominated a prize, gift, award, premium, or similar term that implies the item is free if, in order to receive the item or use the item for its intended purpose the intended recipient is required to

1 spend any sum of money, including but not limited to shipping fees,
2 deposits, handling fees, payment for one item in order to receive another at
3 no charge, or the purchase of another item or the expenditure of funds in
4 order to make meaningful use of the item awarded in the promotion. The
payment of any applicable state or federal taxes by a recipient directly to a
government entity is not a violation of this section.”

5 In violation of RCW 19.170.040:

- 6 (a) included a prize in an offer when the promoter or sponsor knows or has
7 reason to know that the prize will not be available in a sufficient quantity
based upon the reasonably anticipated response to the offer.
- 8 (b) failed to comply with subsection (5) which provides: “If the prize is not
available for immediate delivery to the recipient, the recipient shall be
given, at the promoter or sponsor's option, a rain check for the prize, the
verifiable retail value of the prize in cash, or a substitute item of equal or
greater verifiable retail value.”
- 9 (c) failed to comply with subsection 5(b), which provides: “If the rain check
10 cannot be honored within thirty days, the promoter or sponsor shall mail to
the person a valid check or money order for the verifiable retail value of
the prize described in this chapter.”
- 11 (d) failed to comply with subsection (6), which provides: “A sponsor shall
12 fulfill the rain check within thirty days if the person named as being
responsible fails to honor it.”
- 13 (e) failed to comply with subsection (7) , which provides: “The offer shall
14 contain the following clear and conspicuous statement of recipients' rights
15 printed in type at least as large as the typeface used in the standard text of
the offer:” If you receive a rain check in lieu of the prize, you are entitled
16 by law to receive the prize, an item of equal or greater value, or the cash
17 equivalent of the offered prize within thirty days of the date on which you
claimed the prize.” “.
- 18 (f) failed to comply with subsection (8) , which provides: “It is a violation of
19 this chapter to misrepresent the quality, type, value, or availability of a
prize.”

20 5. **Demand for jury.** Plaintiff demands that this cause be tried to a jury.

21
22
23
24
25
FIRST AMENDED COMPLAINT FOR DAMAGES,
PENALTIES, ETC. -9
GORDON v. ASCENTIVE, LLC, ET AL.

MERKLE SIEGEL & FRIEDRICHSEN
1325 Fourth Ave., Suite 940
Seattle, WA 98101
Phone: 206-624-9392
Fax: 206-624-0717

1447

1 PRAYER FOR RELIEF

2 Plaintiffs pray for relief as follows:

3 That the Court adjudge and decree that defendant has engaged in the conduct complained
of herein.

4 That the Court adjudge and decree that the conduct complained of herein constitutes
5 violations of the Federal Can-Spam Act of 2003, 15 U.S.C. §7705, and that Plaintiffs are
6 entitled to all damages provided for thereunder, as may be proved at trial;

7 That the Court adjudge and decree that the conduct complained of herein constitutes
8 violations of the Washington Commercial Electronic Mail Act, RCW 19.190 et seq., and
9 that Plaintiff is entitled to all damages provided for thereunder, as may be proved at trial,
10 including but not limited to treble damages of up to three times the per statutory damages
11 provided therein for each violation committed by the defendants, in an amount to be proven
12 at trial;

13 That the Court adjudge and decree that the conduct complained of herein constitutes
14 violations of RCW 19.170 et seq. and that Plaintiff is entitled to all damages provided for
15 thereunder, as may be proved at trial, including but not limited to aggravated damages
16 under RCW 19.170.060 of up to three times the amount of statutory damages for these
17 violations committed by the defendants willfully and knowingly, and for defendants'
18 unlawful activity.

19 That the Court adjudge and decree that the conduct complained of herein constitutes
20 violations of the Washington Consumer Protection Act, RCW 19.86 et seq., and that
21 Plaintiff is entitled to all damages provided for thereunder, as may be proved at trial;

22 That the Court adjudge and decree that the conduct complained of herein further
23 constitutes violations of RCW 9.35 et seq., and as such constitute violations of the
24 Washington Consumer Protection Act, RCW 19.86 et seq., and that Plaintiff is entitled to
all damages provided for thereunder, as may be proved at trial;

25 That the Court assess civil penalties, pursuant to 19.190.040(1) of five hundred dollars
(\$500) per violation against defendant for each and every one of the commercial electronic
mail messages sent to plaintiff Gordon in violation of RCW 19.190.020.

1488
FIRST AMENDED COMPLAINT FOR DAMAGES,
PENALTIES, ETC. -10
GORDON v. ASCENTIVE, LLC, ET AL.

MERKLE SIEGEL & FRIEDRICHSEN
1325 Fourth Ave., Suite 940
Seattle, WA 98101
Phone: 206-624-9392
Fax: 206-624-0717

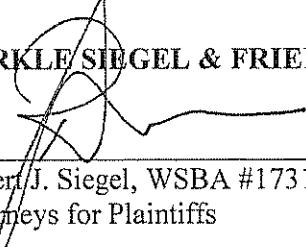
1 That the Court assess civil penalties, pursuant to 19.190.040(1) one thousand dollars
2 (\$1,000) per violation against defendant for each and every one of the commercial
3 electronic mail messages sent through plaintiff Gordon's interactive computer service in
4 violation of RCW 19.190.020.

5 That the Court assess civil penalties in the way of treble damages pursuant to RCW
6 19.86.140, of two thousand dollars (\$2,000) for each and every one of the violations of
7 RCW 19.86 caused by the conduct complained of herein.

8 That the Court enter judgment pursuant to RCW 19.86.140 providing that Plaintiff has
9 been injured by the conduct complained of herein, and ordering that Plaintiff recover from
10 the defendant the costs of this action, including reasonable attorney's fees.

11 That the Court order such other relief as it may deem just and proper to fully and
12 effectively remedy the effects of, and prevent future instances of, the conduct complained
13 of herein, or which may otherwise seem proper to the Court.

14 DATED this 13th day of April, 2006.

15 
16 MERKLE SIEGEL & FRIEDRICHSEN, P.C.
17

18
19 Robert J. Siegel, WSBA #17312
20 Attorneys for Plaintiffs
21
22
23
24
25

FIRST AMENDED COMPLAINT FOR DAMAGES,
PENALTIES, ETC. -11
GORDON v. ASCENTIVE, LLC, ET AL.

MERKLE SIEGEL & FRIEDRICHSEN
1325 Fourth Ave., Suite 940
Seattle, WA 98101
Phone: 206-624-9392
Fax: 206-624-0717

144

UNITED STATES DISTRICT COURT

Western District of Washington, Seattle

JAMES S. GORDON, Jr., a married
Individual, d/b/a
'GORDONWORKS.COM',

SUMMONS IN A CIVIL CASE

v.

ASCENTIVE, LLC, a Delaware
Corporation, ADAM SCHRAN,
individually and as part of his
marital community; JOHN DOES, I-X,

CASE NUMBER:

C 06-1284 TSZ

TO: Ascentive, LLC

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY,

Robert J. Siegel
1325 Fourth Avenue
Suite 940
Seattle, WA 98101

an answer to the complaint which is served on you with this summons, within _____ days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

BRUCE RIFKIN

CLERK
Tom Kondziora

(By) DEPUTY CLERK

DATE

7-7-06

161

Exhibit 11

Floyd Ivey

From: Bob Siegel [bob@msfseattle.com]
Sent: Monday, September 11, 2006 6:37 PM
To: Floyd Ivey
Cc: doug@mckinleylaw.com; Bob Siegel
Subject: RE: Omni Innovations LLC v. Ascentive, Schran

Floyd,

Thank you for your request. However, it is respectfully declined. First, we will soon amend the complaint to include a resident of Seattle, who is elderly and would be much inconvenienced by having to prosecute her claims in Richland. Further, since we assume that you will not undertake to represent your client in this action, due to what would be a glaring conflict of interest, we do not expect that the location of counsel will create any prejudice to your client. Of course, should you even attempt to appear to represent interests adverse to your former client Omni, without obtaining the required waiver, such conflict would certainly result in a motion to disqualify, which, of course would likely be granted.

As for the experience of the Courts, I am sure that the Western District would consider itself sufficiently experienced in this area, as do I.

Sincerely,
Bob Siegel

From: Floyd Ivey [mailto:fivey@LICBS.com]
Sent: Monday, September 11, 2006 6:01 PM
To: Bob Siegel; doug@mckinleylaw.com
Subject: Omni Innovations LLC v. Ascentive, Schran

Gentlemen,

You've filed the indicated action in the Western District. Mr. Gordon resides in the Eastern District. The court here is familiar with these cases. I ask that you voluntarily transfer to the Eastern District.

Thank you.

Floyd E. Ivey
Attorney at Law
Liebler, Ivey, Connor, Berry & St. Hilaire
Box 6125
1141 N. Edison, Suite C
Kennewick, Wa. 99336
509 735 3581
509 735 3585(fax)
509 948 0943(cell)

152

Exhibit 12



CORPOR.

Corporations Menu

Enter Keywords

Se

Search Results

« S

Your search for businesses starting with "**omni innovations**" returned the following results:

[OMNI INNOVATIONS, LLC](#)

« S

Disclaimer

Information in the Secretary of State's Online Corporations Database is updated Monday through Friday by 5:00 Pacific Standard Time (state holidays excluded). Neither the State of Washington nor any agency, officer, or employee of the State of Washington warrants the accuracy, reliability, or timeliness of any information in the Public Access System. While every effort is made to ensure the accuracy of this information, portions may be incorrect or not current. Any entity who relies on information obtained from the System does so at his or her own risk.

[Address Confidentiality](#) | [Apostilles](#) | [Archives](#) | [Charitable Trusts & Solicitations](#) | [Corporations](#) | [Digital Signatures](#)

[Elections & Voting](#) | [International Trade](#) | [Library](#) | [Medals of Merit & Valor](#) | [News Releases](#) | [Oral History](#) | [Productivity Board](#)
[State Flag](#) | [State Seal](#) | [Washington History](#)

Washington Secretary of State
801 Capitol Way South
PO Box 40234, Olympia WA 98504-0234
(360) 753-7115

[Phone Numbers](#) | [Privacy Policy](#) | [Accessibility](#)

153

Exhibit 13



CORPOR

Corporations Menu

» Print Page

Enter Keywords

Se

Corporations Division - Registration Data Search

OMNI INNOVATIONS, LLC

UBI Number 602 054 409**Category** Limited Liability Regular**Profit/Nonprofit** Profit**Active/Inactive** Active**State of Incorporation** WA**Date of Incorporation** 07/25/2000**License Expiration Date** 07/31/2007

Registered Agent Information

Agent Name JAMES S GORDON**Address** 9804 BUCKINGHAM DR**City** PASCO**State** WA**ZIP** 99301

Special Address Information

Address**City****State****Zip**[« Return to Search List](#)

154